Supreme Court, U. S.
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80-611

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MATTHEW CIANCIULLI, JR.

and

JOSEPH R. RICCA,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The questions presented here are:

1. Were the Petitioners denied their rights to due process of law and their right of confrontation as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States by the Trial Court's Abuse of Discretion in restricting cross examination of the Government's expert witness and in excluding Petitioners' proffered expert witness testimony?

2. Did the Court of Appeals err in affirming the district court's decision to withhold information regarding a tainted alternate juror, prior to her being seated as a regular, render the Petitioners trial fundamentally unfair and deprive them of due process of law, in violation of the Fifth and Sixth Amendments, United States Constitution?

3. Did the Court of Appeals err in affirming the district court's expansive interpretation of prosecutorial statements, concerning Petitioners "stone-walling", deprive Petitioners' of the full protection of the Fifth Amendment, United States Constitution and render Petitioners' trial fundamentally unfair?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Matthew Cianciulli, Jr. and Joseph R. Ricca, pray that a Writ of Certiorari issue to review the Judgment Order of the Court of Appeals for the Third Circuit rendered in these proceedings of July 1, 1980.

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania by Opinion and Order dated October 23, 1979, denied Petitioners' post-verdict motions. The Opinion and Order of the district court are printed at Appendix A, infra at pages 1 through 86.

JURISDICTION

On July 1, 1980 the Court of Appeals for the Third Circuit entered a judgment order affirming the district Court's holding. On July 15, 1980 Petitioners filed a Petition for Rehearing which was denied on July 29, 1980. On July 29, 1980, August 20, 1980 and September 17, 1980 Petitioners filed Motions for Stay of Mandate pending Application to this Court for a Writ of Certiorari which the Court of Appeals granted by Orders dated August 13, 1980, August 27, 1980 and September 23, 1980, and which are printed at Appendices infra at pages 89 through 93.

This honorable Court granted Petitioner an extension of time until October 15, 1980 in which to file the Petition, said order appearing in the Appendix, infra at page 92. The Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution which provide in relevant part:

> "Fifth Amendment: No person shall be . . . deprived of life, liberty or property, without due process of law . . .

Sixth Amendment: In all criminal, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and have the Assistance of Counsel for his defense."

This case involves §1973 (i) (c) of Title 42, United States Code, which provides as follows:

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, or Resident Commissioner of the Commonwealth of Puerto Rico.

This case, as well, involves Section 241 of Title 18, United States Code, which provides as follows:

Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if

death results, they shall be subject to imprisonment for any term of years or for life.

This case, as well indicates Federal Rules of Evidence Number 702 and 402 which provides as follows:

> Federal Rule of Evidence 702
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience training or education may testify thereto in the form of an opinion or otherwise.

> Federal Rule of Evidence 402
> All relevant evidence is admissable.

STATEMENT OF THE CASE

1. History Before the District Court

On September 24, 1980, Petitioners Matthew Cianciulli, Jr. was convicted of one count of conspiring to provide false voter registration information under Title 42, U.S.C. Section 1973 (i) (c), one count of conspiring to violate the civil rights and privileges of citizens, under Title 18 U.S.C. Section 241, and nine counts of aiding and abetting the false registration of voters, under Title 42, United States Code Section 1973 (i) (c).

Petitioner Joseph R. Ricca was convicted of one count of conspiring to violate the civil rights and privileges of citizens, under Title 18 U.S.C. Sec. 241 and three counts of aiding and abetting the false registration of voters, under Title 42 United States Code Section 1973 (i) (c).

The indictment contained fifty (50) predicated acts alleging that Petitioners conspired to encourage false registration, gave false information for the purpose of establishing eligiblity register, committed mail fraud and conspired to injure citizens in the exercise of Constitu-

tional rights. Distilled to its essence, Petitioners were convicted of aiding nine voters to falsely register.

The evidence established that between March, 1974 and September, 1976, fifty-five (55) individuals who were registered to vote from nine addresses within the First Ward, Thirteenth Division, while having a connection of some kind with these addresses, had not lived there on either a permanent or exclusive basis.

As part of its case the government called Joseph Migatz the Administrator of the Voter Registration Division of the Philadelphia City Commissioner's Office, who testified as an expert witness regarding residency and voter eligibility under the Pennsylvania Constitution.

Petitioners' counsel was denied an Offer of Proof prior to his taking the stand. In addition when the defendants' attempted to rebutt this expert testimony with their own expert, from the Voting Commission, the Court would not permit it.

The Court's denial of the defense Motion for an Offer of Proof, the admission of clearly rank, uncontradicted opinion of a government expert and its denial of a defense motion to present a rebuttal expert, denied defendants their Fifth and Sixth Amendment rights to confrontation cross-examination and effective assistance of counsel.

During the Petitioners trial outside contact was made with an alternate juror. Although known to the Court, this information was not disclosed to Petitioners' counsel prior to this alternate being seated as a regular.

Motions for a mistrial arising out of this incident and the Court's clear abuse of its discretion which denied defendants their Fifth Amendment rights were denied.

In his summation to the jury the government prosecutor referred to the evidence against the defendants as "uncontradicted" and stated that the defendants "stonewalling" had continued throughout the trial. A re-

mark which had to call attention to the defendants failure to take the stand Defense Motions for a mistrail were denied thereby depriving defendants of their Fifth Amendment Rights.

2. *The Judgment of the Court of Appeals*

On July 1, 1980, a panel of the Court of Appeals for the Third Circuit affirmed Petitioners' conviction by Judgment Order. (Appendix 87)

REASONS FOR GRANTING THE WRIT

I.

The lower court has decided an important question, regarding the application of Federal Law which has not been, but should be, settled by this Court and has placed it in conflict with other Federal Courts of Appeal, specifically United States v. Garvin and United States v. Dellinger.

During petitioners' trial the government presented the expert testimony of Joseph Migatz, the Administrator of the Philadelphia Voting Commission. In his testimony he gave the definition of "residence" based upon his interpretation of the Pennsylvania Constitution. It was a single sentence definition, notwithstanding the fact that the legislature and Courts of Pennsylvania have spent considerable time and litigation in attempting to define residence.[1]

The trial judge himself stated that the concept of residency as used in 42 Sec 1973 (i) (c) "turned upon the construction of Pennsylvania statutory and decisional law on residency."[2]

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1. Pennsylvania legislature has provided in Section 2814 of the Pennsylvania Election Law Title 25, seven rules to be followed in determining the residency of a person.

2. Trial Court's Memorandum Opinion Appendix, p.68.

When petitioners attempted to introduce the expert rebuttal testimony of the solicitor and Deputy Commissioner to the Philadelphia Voting Commission, Michael McAllister, Esquire, to enunciate the policy, with regard to residency, of the Philadelphia Voting Commission, they were stopped.

Rule 402 of the F.R. Ev. states that "All relevant evidence is admissable." Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence."

Rule 702 of the F.R. of Ev. provides for the admission of expert testimony that will be helpful to the trier of fact.

The 8th Circuit Court of Appeals in *United States v. Garvin*, 565 F.2d 519 (1977) stated that:

> "(defendant) in presenting his good faith defense, be permitted to submit evidence of the other policies introduced against him and of his lack of intent to defraud."

That case held that in the interpretation of the meaning of language on forms for insurance policies, the layman can use the help of an expert.

Similarly, the 7th Circuit in *United States v. Dellinger*, 472 F.2d 340 ruled that testimony of witnesses called as experts was relevant to a crucial element in the proof of the government's case and to exclude it was an abuse of discretion.

In the present case terminology, i.e. the meaning of a word — "residence" is a critical fact in the government case. The Court by permitting only the government witnesses definition presents an uncontradicted and unbalanced view to the ultimate prejudice of and harm of the defendants.

The damaging expert testimony had already been heard by the trier of fact, from the prosecution witness

Mr. Migatz; the trial Court in prohibiting the testimony of the defense expert tipped the balance unfairly[3] and was manifestly erroneous and a clear abuse of discretion. *Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856 (1975).

This lack of judicial evenhandedness places in serious jeopardy the question of defendant's right to due process and the effective assistance of counsel balanced against the discretion of the trial court as to the admission or exclusion of expert testimony. There is needed more meaningful criteria to determine the boundaries of judicial discretion.

In the present case and as part of the same (evidentiary) circumstances the lower court admitted the expert testimony of Mr. Migatz after denying a defense motion for an Offer of Proof.

The unfettered right to complete an intelligent cross-examination of government witnesses is a crucial and minimum ingredient of a fair trial.

In *Davis v. Alaska*, 415 U.S. 308, 318 (1974) this Court stated that the denial of "the right to effective cross-examination . . . should be constitutional error of the first magnitude and no amount of showing of want or prejudice would cure it."

By denying defense counsel Motion for an Offer of Proof, even as to the witnesses qualifications, the lower court seriously crippled defense counsel's ability to ef-

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3. SLOUGH "TESTAMENTARY CAPACITY EVIDENTIARY ASPECTS" 36 Tex. L. Rev. 1, 11-12.

"It is a curious turn of mind that impels a judge to mistrust the ability of the juror to assay the opinion of an expert and simultaneously gives the same juror undeserved credit with respect to comprehension of an abstract, complex instruction. The reason behind the rule assumes that the jury will accept all opinions uttered at fact value, overlooking the fact that the jurors have free rein under most circumstances to discount testimony presented for their consumption. In addition, it appears to discount the value of cross examination implying that expert opinion is beyond the pale of contradiction."

fectively cross-examine the government expert witness and thereby denied the defendants their Sixth Amendment rights of effective assistance of counsel.

II.

The Court below disregarded controlling decisions of this Court and denied Petitioners the full protection and benefit of their Fifth and Sixth Amendment rights.

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in an open court and not by any outside influence, whether of private talk or public print."

Thus stated this Court in *Patterson v. People of State of Colorado*, 205 U.S. 454, 27 S.Ct. 556, 558.

During Petitioner's trial an alternate female juror had an inocuous, although to her, disturbing, private contact with the brother of a defendant. After discussing it with her fiance, she reported it to the trial judge, who did not inform counsel but immediately called in the F.B.I. to investigate.

A few days later, a regular juror was absent and the Judge, while withholding this information, asked counsel if the alternate should be seated. Counsel agreed, being uninformed of the possible taint of the alternate juror. Upon learning this critical fact, Motions for a mistrial were made and all denied.

The trial court's failure to remove this juror or at the very minimum, to inform counsel prior to her seating of the private communication and F.B.I. Investigation, amounts to an abuse of judicial discretion and denies Petitioners their Fifth Amendment Rights.

The approach discussed by this Court in *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450 is that:

> "Any private communication, contact or tampering, directly or indirectly with a juror during a

> trial about the matter pending before the jury is, for obvious reasons deemed presumptively prejudicial if not made in pursuance of known rules of the courts and the instructions and directions of the Court made during the trial, with full knowledge of the parties."

Instead, the trial court, who thought the incident important enough to warrant an F.B.I. investigation but not important enough to inform counsel, distorted the guidelines set forth by this Court in Remmer v. United States, supra. which denied Petitioners their Fifth Amendment right to due process of law.

III.

The lower court has disregarded controlling decisions of this court on an important question of constitutional law, specifically Griffin v. State of California.

Petitioners' case represents prosecutorial misconduct in its purest form i.e. comment during the summation on the defendants' failure to testify on their own behalf.

This Court condemned such conduct over eighty-five years ago in federal criminal cases, in *Wilson v. United States*, 149 U.S. 60,13 S. Ct 765 (1983) and more recently in *Griffin v. State of California*, 380 U.S. 609, 85 S. Ct. 1229 (1965).

In Griffin, supra, this Court stated:

> "Comment on the refusal to testify is a remnant of the inquisatorial system of criminal justice which the Fifth Amendment outlaws".

Given the atmosphere of the post Watergate era, the term "stonewalling" has come to mean remaining silent in common parlance. By not immediately issuing a curative instruction or granting defense motions for a mis-

trial, the lower Court ignored the test enunciated by the Third Circuit Court of Appeals in *United States v. Chaney*, 446 F. 2d 571, cert denied 404 U.S. 993, 992 S. Ct. 543. The Court stated:

> "The test for determining whether a remark constitutes an improper comment on an accused's failure to take the stand in his own behalf is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify".

The Fifth Amendment protection against self incrimination is so central to the integrity of the criminal justice process under our system that the way in which this problem is avoided is by requiring absolute silence by the prosecution on the defendant's failure to speak on his own behalf.

To make the harm to defendants even more egregious, the damaging remark was made by the prosecutor during his rebuttal argument. The defendants were left with no protection from either the lower Court, which refused all motions for mistrial and failed to give a curative instruction, or their own counsel, who were precluded from speaking again.

CONCLUSION

The lower Court's ruling as to the admission of expert testimony, the seating of a juror without prior notice to counsel, of private communication between her and a defense relative and its failure to grant a mistrial or give a curative instruction after improper prosecutional statements were in violation of controlling decisions of this Court, accompanied by the denial of defendants Fifth and Sixth Amendment rights, respectfully warrant that the Petition for Certiorari be granted to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Counsel for Petitioners,
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JOSEPH R. RICCA

80-611

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	Criminal
v.	
MATTHEW J. CIANCIULLI, JR.	Nos. 79-165-1
JOSEPH R. RICCA	-2
ANTHONY FIORENTINO	-6

MEMORANDUM OPINION

BECHTLE, J. December 17, 1979

Presently before the Court are the post-trial motions of defendants Matthew J. Cianciulli, Jr. ("Cianciulli"), Joseph R. Ricca ("Ricca") and Anthony Fiorentino ("Fiorentino") for judgment of acquittal, arrest of judgment and new trial, pursuant to Fed.R.Crim.P. 29, 33 and 34. After a careful and exhaustive examination of the relevant statutes, decisional law, the record and arguments of counsel, in their briefs and at oral argument, the motions were denied by the Court's Order dated October 23, 1979, and the within Memorandum Opinion is in support thereof.

The case concerns alleged criminal conduct perpetrated by 25 defendants and approximately 15 unindicted actors through a pattern of conspiratorial and individual activities in falsely registering to become eligible to vote in federal elections. The evidence adduced at trial showed a common course of conduct over a three-year period, beginning in 1975 and occurring in the 1st ward in the 13th division of the 183rd state legislative district in the City of Philadelphia. The 49-count criminal indictment was returned by the grand jury after two years of investigation, which involved the interviewing of approximately 120 witnesses by the Federal Bureau of

Investigation ("FBI"), the Pennsylvania Crime Commission, the Philadelphia Voters Commission and the examination of approximately 30 witnesses before the federal grand jury. The indictment charged 25 defendants with conspiracy to encourage false registration, 42 U.S.C. §1973i(c);[1] giving false information for the purpose of establishing eligibility to register to vote, 42 U.S.C. §1973i; and, conspiracy to injure citizens in the exercise of their constitutional rights, 18 U.S.C. §241.[2] Eight of the 25 defendants were additionally charged with aiding and abetting others to falsely register to vote through the use of false addresses and false periods of

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1. 42 U.S.C. §1973i(c) provides:

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

2. 18 U.S.C. §241 provides:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured —

They shall be fined no more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

residence in the state legislative district, 18 U.S.C. §2.[3] Defendant Cianciulli, who at the time of the indictment was the Pennsylvania state representative from the 183rd legislative district, was also a resident of the political ward involved and had been involved in local politics there for several years and, according to the Government, was the principal beneficiary of the registration fraud. He was charged with four counts of mail fraud for allegedly using the mails for transmittal of false mail voting registration forms, in violation of 18 U.S.C §1341.[4] By Memorandum Opinion and Order dated August 30, 1979, this Court ordered *sua sponte* severance of the case into three separate trials, pursuant to the Court's express and inherent powers under Fed.R.Crim.P. 14 and based upon the interests of due process and judicial economy. *U.S. v. Cianciulli*, 476 F.Supp. 845 (E.D.Pa.

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3. 18 U.S.C. §2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

4. 18 U.S.C. §1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

1979). Pursuant to that Order, defendants Cianciulli, Ricca, Fiorentino, Joseph Asnes ("Asnes"), Vincent Lombardo ("Lombardo") and Ramon Meirino ("Meirino") were tried together in the first trial commencing on September 7, 1979. Two of the 25 defendants pleaded guilty prior to commencement of the first trial. Prior to the presentation of testimony, two days of hearings were held on various suppression motions and one day was spent in selecting the jury of twelve with four alternates. The trial proceeded for eight days, during which the testimony of 64 witnesses was heard and the introduction of some 140 exhibits was received. Of the 64 witnesses, the defense presented 24 witnesses. The defendants did not testify. On September 18, 1979, as a result of an incident involving a hallway communication made to an alternate juror by the brother of defendant Fiorentino, the jury was ordered sequestered for the remainder of the trial. The verdict was returned on September 24, 1979, after the jury had deliberated for three days. The jury found five of the six defendants guilty on a total of 19 counts and acquitted them on the remaining 26 counts of the indictment.[5] The remaining 17 defendants awaiting trial as a result of severance pleaded guilty to various counts after the first trial. Post-trial motions were filed by the defendants who were convicted at trial on September 26 and October 1, 1979. Sentence was imposed on October 4, 24, 25 and November 8 and 9, 1979, and an appeal was filed on October 25, 1979.

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5. The jury verdict was as follows: Defendant Cianciulli was found guilty of one count of conspiracy to encourage false registration, 42 U.S.C. §1973i(c); nine counts of aiding and abetting, 18 U.S.C. §2; and, one count of conspiracy to injure citizens in the exercise of their constitutional rights, 18 U.S.C. §241. He was acquitted on nine counts of aiding and abetting and four counts of mail fraud, 18 U.S.C. §1341. Defendant Ricca was found guilty of one count of conspiracy to encourage false registration; three counts of aiding and abetting; and, one count of conspiracy to injure citizens in the exercise of their constitutional rights. He was acquitted on

I. Prosecutorial Misstatements

The first and perhaps quintessential issue raised by the defendants in their post-trial motions concerns the constitutional propriety of certain direct and indirect comments made by the Government during the course of its closing and rebuttal arguments which allegedly concern the failure of the defendants to testify at trial. The defendants contend that these remarks violated the letter as well as the spirit of the prohibition established in *Griffin v. California*, 380 U.S. 609 (1965), because they could have been construed by the jury as a comment on the fact that the defendants invoked their right not to testify. In *Griffin*, the United States Supreme Court held:

> [T]he Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

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two counts of aiding and abetting. Defendant Lombardo was found guilty on one count of giving false information for the purpose of establishing his eligibility to register to vote, 42 U.S.C. §1973i(c), and he was acquitted on one count of conspiracy to encourage false registration and one count of conspiracy to injure citizens in the exercise of their constitutional rights. Defendant Meirino was found not guilty on all four counts in which he was charged. Defendant Fiorentino was found guilty of one count of giving false information for the purpose of establishing eligibility to register to vote; and he was acquitted of one count of conspiracy to encourage false registration, one count of aiding and abetting and one count of conspiracy to injure citizens in the exercise of their constitutional rights. Finally, defendant Asnes was found guilty of one count of giving false information for the purpose of establishing eligibility to register to vote, and he was acquitted on one count of conspiracy to encourage false registration and one count of conspiracy to injure citizens in the exercise of their constitutional rights.

380 U.S. at 615.

The basic test to determine whether a violation of due process has occurred was recently articulated by the Court of Appeals for the Third Circuit in *U.S. v. Waller*, No. 79-1211 (3d Cir., filed October 5, 1979) (*per curiam*). The *Waller* court held:

> The test for determining whether a remark constitutes an improper comment on an accused's failure to take the stand in his own behalf is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Chaney*, 446 F.2d 571, 576 (3d Cir.), *cert. denied*, 404 U.S. 1038 (1977).

Slip op at 3. *See also Slakoff v. U.S.*, 8 F.2d 9, 11 (3d Cir. 1925); *U.S. v. Gatto*, 299 F.Supp. 697, 703 (E.D.Pa. 1969).

In order to assess whether "[a] jury would naturally and necessarily take [the prosecutor's remarks] to be a comment on the failure of [an] accused to testify," it is necessary for the reviewing court to step into the shoes of the jury to evaluate what was heard, seen and *perceived* by it within the context of the totality of the trial. Stated in the converse, the reviewing court must be careful to avoid using an approach that isolates words, sentences and phrases out of the context of the trial in an attempt to determine their meaning and impact on the minds of the jurors who were part of the trial that included the very comments in question. A detached, "reasonable person" approach cannot comport with the pronouncements set forth in *Griffin*. The Court is also compelled to determine whether the comments of the prosecutor were made in response to an earlier defense challenge, invitation or strategy, or in response to testimony presented at trial to the jury. The two pivotal questions under the test are: (1) What was intended by the

comments?"; and (2), despite the prosecutor's intent in his remarks, "What would the jury — in the context of the *total* trial — 'naturally and necessarily' draw from the challenged words?" The authorities teach us that what is or is not prejudicial varies from case to case and that there are no fixed rules available that prohibit the use of certain words or phrases. *See U.S. v. Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976); *U.S. v. Handman*, 447 F.2d 853, 856 (7th Cir. 1971); *Rodriguez-Sandoval v. U.S.*, 409 F.2d 529, 531 (1st Cir. 1969); *U.S. v. Venable*, 443 F.Supp. 178, 182 (E.D.Pa. 1977); *U.S. v. Gatto, supra*, 299 F.Supp. at 703.

A. *Language Concerning "Stonewalling"*

In their post-trial motions, the defendants have objected to two particular sets of remarks that the Government made during the course of its closing and rebuttal arguments. First, the defendants contend that the following remarks, made during the course of the Government's rebuttal argument, violated the rule established in *Griffin v. California*:

> Another question that was asked by a number of defense attorneys that merits a response is, "Well, why were these Government witnesses here immunized when some of these defendants are on trial?"
>
> Well, very simple: It is because eventually and perhaps reluctantly before the grand jury these individual voters did finally tell the truth and they did agree to testify who was really behind their false registration.
>
> That's not the case with the defendants in this courtroom. Their stonewalling has persisted throughout this trial.
>
> Mr. Lombardo said to the FBI that, "When my handwritten form was filled out, my mail-in registration form, Mr. Cianciulli wasn't even there."

That's what he said to Agent Lovelace. And that's just not true. He didn't come clean.

The same thing with Mr. Asnes. He said once to the Crime Commission, he said he lived there; another story to the FBI; he refused to come clean and say the circumstances surrounding his registration.

The same with Mr. Fiorentino: He registered at an address he didn't live, refused to offer any explanation as to why he did that.

The same with Mr. Meirino: He gave a statement he didn't even know Ted Barone. He gave a statement that he, in fact, lived at that address, refused to come clean.

That's the difference between these defendants and the Government witnesses. They were given immunity because they were able to get to the circumstances behind the crime, who was responsible for the systematic pattern of false registrations.

N.T. 8-13 to 15.

Let us consider the test articulated by the Third Circuit Court of Appeals in *U.S. v. Waller*, *supra*, that is alternative in nature. First, would the natural and necessary effect of the remarks be to comment on the defendants' failure to testify? Or, second, were the comments made intentionally?

(1) *Natural and Necessary Effect*

Various factors have been considered by the courts to determine whether the natural and necessary effect of a prosecutorial remark was to comment on the failure of a defendant to testify. At the outset, a violation of the *Griffin* prohibition is often found in those situations where the defendants are the only witnesses available who could provide exculpatory evidence that would negate or rebut the Government's evidence. *See U.S. v. Smith*, 421 F.2d 1229, 1230 (3d Cir. 1970); *U.S. v.*

Giuliano, 383 F.2d 30, 35 (3d Cir. 1967); *Linden v. U.S.*, 296 F. 104, 106 (3d Cir. 1924); *U.S. v. Gatto*, *supra*, 299 F.Supp. at 703.

Cases where the defendant is the sole available witness usually arise where the only persons present at the scene of the crime are the defendant and the victim or a Government agent. In these situations, if the Government agent testifies, for example, that an illegal sale of drugs had taken place between the agent and the defendant, then the only possible witness who could refute that evidence would be the defendant himself. A prosecutorial comment to the jury, therefore, suggesting that the jury should have heard more testimony can *only* cause the jury to *naturally* look to the *only* other evidence there is — the defendant — and, hence, this could be a prohibited comment on the defendant's failure to testify. In cases where other witnesses or exhibits are available, or have been presented by the defense, a comment by the prosecutor concerning the defense's evidence would not naturally and necessarily be considered to be a comment on the failure of the defendants to testify, because the remark could have been directed to the other evidence which was or could have been presented.

A classic example of the application of the "sole witness" theory is found in *Linden v. U.S.*, *supra*, which is much relied upon by the defendants. In *Linden*, the only persons present during an illegal sale of liquor were the three defendants and two United States Customs officers, who later testified for the Government. The only persons who could have testified to refute the Government's evidence were the defendants themselves. It is easy to see that the only conclusion that could have been drawn from the following remarks by the trial judge was that the comments referred to the defendants' failure to testify:

> *Now as to that count there is very little to be said. If you believe the evidence, and there is no contradic-*

> *tion of it at all, these three men were caught in a boat on the Shrewbury River, in what is called the Cove between the Highlands and Sandy Hook, with a lot of intoxicating liquor on board.* You heard the testimony with reference to that. *Now, there is not any evidence at all in explanation of that transaction, and there you have the bare facts.* I don't understand that counsel for the defendant makes any serious contention in that regard.

296 F. at 105-106 (emphasis in original).

In contrast to the *Linden* decision is the case of *U.S. v. Smith, supra,* where our very own Third Circuit Court of Appeals reviewed a case involving a defendant who had allegedly given an alias name to the FBI. The defense strategy, presented only through cross-examination of Government witnesses, was that the name was not used as an alias but was the defendant's professional stage name. Although the prosecutor remarked during his closing statement that, "if a man has something to say in his defense, he should say it," the *Smith* court held that no violation of *Griffin* resulted. The court held:

> Defendant could have called third party witnesses to establish his innocent use of a professional name. In such, a situation the quoted response does not fall within Griffin v. California, *supra.* United States v. Giuliano, 383 F.2d 30 (3d Cir. 1967); United States v. Heithaus, 377 F.2d 484 (3d Cir. 1967).

421 F.2d at 1230. *See also U.S. v. Bartemio,* 547 F.2d 341, 346 (7th Cir. 1974) ("Likewise, we find that the government's reference to certain evidence as being 'uncontradicted and uncontested' could not have naturally and necessarily been taken by the jury as a comment upon Appellant Brennan's right not to testify . . . Brennan was not the only person who could have challenged or contradicted such evidence. Indeed any of the other participants could have rebutted such evidence."); *U.S. v. Giuliano, supra,* 383 F.2d at 35 (unlike *Linden,*

in his remark, the district attorney was pointing to his own evidence and not to the defendant; in addition, other potential witnesses were available).

A similar situation occurred in the case of *U.S. v. Gatto, supra*, 299 F.Supp. 697 (E.D.Pa. 1969), where it was alleged that certain prosecutorial remarks were violative of *Griffin*. The court held that:

> [a]lthough the defendants in this case could have testified on the subject of whether a legitimate siding business was being conducted, witnesses other than the defendants also could have so testified: employes, customers, suppliers, creditors, etc. Indeed, the proof could have rested on the proffer of certain documentary evidence: account books, sales receipts, insurance policies, etc. It was not to call attention to the defendants' failure to testify, then, but to their failure to offer proof that this comment was directed. . . .

299 F.Supp. at 703.

In the instant case, contrary to the assertions of defense counsel at oral argument, other witnesses were not only available but many actually testified in a defense attempt to exculpate every one of the convicted defendants. Therefore, in contrast to the "sole witness" setting of *Linden*, the *Griffin* prohibition does not apply to the challenged comments here.

The following items from the record clearly indicate that this is not a sole witness case: First, as to all of the defendants, many witnesses were called by the Government who admitted under direct and cross-examination that, although the address they had supplied to register to vote was false, they believed that what they had done was not "illegal."[6] This testimony went directly to the

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6. For example, the following immunized Government witnesses testified as to the issue of intent to falsely register: Charles Lynch, N.T. I-242 (did not think he violated any criminal laws at the time); George Daly, N.T. 2-54, 55, 61 ("To me it was like ille-

major defense offered by the defendants — namely, that the acts which they committed were not done "knowingly or willfully," as required for a violation of 42 U.S.C. §1973i(c) and 18 U.S.C. §§241, 2 and 1341. They argued instead that the acts were done out of inadvertence or mistake.[7] More precisely, counsel for defendant

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NOTE 6 — *(Continued)*

gally parking a car, getting a traffic ticket or something. I felt as though I wasn't doing anything deeply wrong . . . I didn't believe I was doing anything criminal. . . .") Steve Manion, N.T. 2-73 (did not think at time that he was violating any criminal laws); Joan Donaldson, N.T. 2-112, 113 (never thought that it was a criminal violation); Kenneth Donaldson, N.T. 3-50 (in his mind thought "absolutely not" committing a crime); Carmen Pungitore, N.T. 4-59, 60 ("I didn't think anything was wrong with it, because I was only voting one time."); Angelo Sannutti, N.T. 4-75 to 77 ("I didn't think nothing was wrong as long as you vote once . . . I just used an address I didn't live at."); Richard DeAngelis, N.T. 4-84, 85 (did not think anything wrong when registered to vote); Nicholas Pisano, N.T. 4-107 to 109 ("Not a crime, definitely not . . . I didn't think I was doing anything illegal. Morally wrong, but illegal I didn't realize."); Walter Middleton, N.T. 4-133, 134 (did not know it was a crime, ". . . I was in the same district, I thought, and I was doing someone a favor, you know."); Elaine Middleton, N.T. 4-166, 166A (saw nothing illegal about her acts); and, Anthony Pisano, N.T. 4-198, 199 ("And I was not quite sure it was illegal or — I knew it was not right. I cannot say I knew definitely that it was illegal to register. I thought if I didn't vote, it didn't matter. It was just — it is something that nullifies itself.").

7. Illustrative of this position were the statements of Cianciulli's defense attorney in his closing remarks to the jury when he stated:

> But if the activities of these people in allegedly conspiring together in filling out the registration forms was done out of accident, mistake, or other innocent reason, it's not a crime. It doesn't mean it is correct but it is not a crime.
>
> There's a difference between filling a form out wrong and violating the law. If you apply for a driver's license, maybe you have a girl friend who wants a driver's license sent to her house because you're there occasionally, you live somewhere else, so you put down her address on the form. Harrisburg calls you up and says, "By the way, sir, is that your residence? Do you live there most of the time; All the time?"

Cianciulli argued in his closing argument to the jury that, as to those particular Government witnesses:

> . . . many of [these] witnesses called by the Government I would have called as witnesses if they hadn't testified because their testimony was favorable to Mr. Cianciulli. They continued to show one after another a lack of criminal intention, a lack of being forced to vote for somebody.

N.T. 8-120.

Therefore, as defense counsel stated,[8] the testimony given by these immunized governnment witnesses as part of the defense strategy would have been presented by the defense if it had not been presented by the Government — presumably to negate the criminal intent not of the witnesses, but of the defendants themselves. The jury did not agree with this argument, as the verdict demonstrates, but no counsel knew that when the summations were made. The defendants were,

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> You say,"No."
>
> "Well, you can't do that. We'll send you another form."
>
> What you have done is improper, but it is not a crime. you didn't have the intention to violate the law. What you did was out of innocent reason, accident, or mistake.
>
> * * *
>
> There must be proof beyond a reasonable doubt, clear and convincing evidence, that the defendants, or Mr. Cianciulli specifically, that the defendant Cianciulli intentionally did an act which he knew the law forbids. That's specific intent. In other words, he knew it was the law and just knocked it over and said, "I'm doing it anyway." Where is the evidence of that?

N.T. 8-115, 116.

8. It should also be noted that counsel for defendant Asnes made extensive use of the testimony of these same Government immunized witnesses in his closing argument in order to attempt to exculpate his client on the question of criminal intent (*see* N.T. 7-50 to 52); the theory clearly being that the jury should consider Asnes' intent to be no more serious than those who testified as to similar conduct.

therefore, not the sole witnesses available to present their major defense as to the issue of intent.

Second, the §1973i(c) claim that the defendants, excluding defendants Cianciulli and Ricca, registered from an address at which they did not live involved a legal issue that ultimately turned upon the construction of Pennsylvania statutory and decisional law on residency for purposes of registering to vote. The issue, under state law, was whether the defendants were in fact legally residing at the addresses from which they had registered in 1975 and 1976. A critical element of the federal criminal statute requires that the person register from an address at which (s)he* does not live, as required by the applicable state election law. The Government sought to show that the false registrants had never lived in, and in many cases had never set foot in, the residences listed on the registration forms. The Government did this through the use of the testimony of a real estate salesman, owners, tenants and neighbors who actually resided at the very same addresses from which these defendants had registered. This, too, then was clearly perceived by the jury as proof that the defendants were not the only witnesses available to prove that they, in fact, had or had not lived at those addresses which were contended by the Government to be false.

Specifically, as to defendant Ricca, during the two-year investigation preceding this indictment, he stated to the FBI and to the federal grand jury that he had *in fact* lived at 1427 South 6th Street and, therefore, his registration to vote from that address was valid under Pennsylvania election law.[9] At trial, defendant Ricca at-

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* Please note, in any instance where either "he" or "she" could be used without changing the meaning or sense of the thought being expressed, the symbol "(s)he" will be used.

9. Although defendant Ricca was not specifically charged with registering from an address at which he did not reside under §1973i, evidence of this act was presented to establish an overt act for purposes of the charge against Ricca of conspiracy to encourage false registration under §1973i.

tempted to further reinforce these pre-indictment statements through the testimony of several witnesses. Anthony Lucidino was called as a defense character witness and testified that Ricca had lived at the 1427 South 6th Street address in the same apartment as defendant Cianciulli. Confronted with evidence that there was only one bedroom in the apartment, Lucidino testified that Ricca had slept in the living room.[10] Additionally, defense character witness Dr. Leopold Salkind testified that he had treated Ricca for influenza at the 1427 South 6th Street address.[11] Finally, a Government witness, Salvatore Cannistraci, who lives at 1427 South 6th Street, stated that he had seen Ricca at that address a few times but was unclear as to whether Ricca actually lived at that address.[12] The combined testimony of these three defense witnesses could be viewed as having an exculpatory effect or as having the effect of corroborating Ricca's prior statements to the FBI and federal grand jury that he had in fact lived at that address at the time he registered to vote. The evidence was offered to prove that he was not guilty of the overt act necessary to sustain the charge of conspiracy to encourage false registration to vote. Plainly, defendant Ricca was not the sole witness available to prove that critical fact. Indeed, Ricca's defense counsel in her closing remarks stressed the testimony of Lucidino and others in an attempt to establish that Ricca did live at that address.[13] Further-

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10. Testimony of September 20, 1979, on cross-examination by the Government, as indicated in the Court's bench notes and in the Court Reporter's official notes.

11. *Id.*, on direct examination.

12. N.T. 1-165, 166, 177, 178, 180.

13. The Court is careful to note that, because other witnesses were available to testify for the defense, but were not presented, does not mean nor was the jury instructed that the defendants had the burden of presenting any witnesses or any evidence at all. It was instructed quite the contrary. N.T. 8-92 to 94. Under *Griffin*, which is not a burden-of-proof case but a prosecutorial comment case, it is necessary for the Court to examine whether the defendants were

more, in the context of this "sole witness" discussion, it is reasonable to assume that, if Ricca had in fact lived at the 1427 South 6th Street address, there would have been other available witnesses to substantiate this factual assertion (*e.g.*, other neighbors, friends and/or employees). Others did testify.

As to defendant Fiorentino, the Government presented the owner of the house containing the apartment from which defendant Fiorentino and his wife had registered. This owner testified that neither Fiorentino nor his wife had ever lived at that address.[14] Again, the Court believes that the jury could naturally conclude that persons other than the defendant could testify that Fiorentino had in fact lived at that address (*e.g.*, his wife, friends, relatives and/or neighbors). Therefore, in the case of defendant Fiorentino under the §1973i count for false registration, he was not the only witness who could have countered the Government's evidence concerning false registration and residence.

Another specific example may be derived from the aiding and abetting counts against defendant Ricca, because there were other witnesses besides defendant Ricca himself who could have favorably testified for him on those counts. Ricca's defense attorney, in her closing speech to the jury, attempted to persuade the jury that Ricca had not aided and abetted the individuals named in the indictment, by reviewing in great detail the testimony of those persons named as being aided and abetted by Ricca and who had testified for the Government as

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NOTE 13 — *(Continued)*
the sole witnesses available to exculpate themselves or whether other witnesses were available, so that a questionable comment by the prosecutor would naturally and necessarily not be taken to be a comment on the defendants' failure to testify. *See U.S. v. Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972); *U.S. v. Smith*, 421 F.2d 1229, 1230 (3d Cir. 1970); *U.S. v. Giuliano*, 383 F.2d 30, 35 (3d Cir. 1967); *U.S. Gatto*, 299 F.Supp. 697, 703 (E.D.Pa. 1969).

14. N.T. 4-91 (testimony of A. J. Fanelli).

immunized witnesses. Ricca's attorney contended that Ricca had not asked any of those persons to falsely register because each witness had testified under oath that he had not. [N.T. 7-67, 68, 71.] She also contended that Ricca had not accompanied any of them to defendant Cianciulli's grocery store, where they had actually falsely registered [N.T. 7-67 to 68], or to official registration centers to register falsely. [N.T. 7-71.] Therefore, there *were* other witnesses besides defendant Ricca who were available to testify to exculpate him. In fact, the jury acquitted Ricca on two counts of aiding and abetting two persons who had testified at trial. Ricca was charged with aiding and abetting Raphael Norcisa ("Norcisa"), who did not testify at trial. Again, from the viewpoint of the sole-witness approach, the defense could have presented Norcisa as a witness to attempt to show that Ricca was not guilty of aiding and abetting on that particular count. *See* comments by counsel for both sides on Norcisa.[15]

These representative examples clearly show that this case is not comparable to the cases where the defendants were the only persons available to testify in rebuttal to the Government's evidence. The plain fact is that this case is not within the *Griffin* prohibition from the sole-witness vantage point, because the jury cannot be said to have naturally and necessarily taken the Government's rebuttal remarks to be a comment on the failure of the defendants to testify because many other witnesses were called or could have been called to support the defendant's contentions in rebutting the Government's case.

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15. N.T. 7-73,74; 8-25. Contrary to the additional contention in defendant Ricca's post-trial motions, these remarks by the Government concerning the failure of the defense to produce Norcisa were not improper. *See* note 13, *supra*. Further, the Court did, contrary to the defendant's claim, give an instruction concerning the burden of proof and production of witnesses by the defense in its charge to the jury; therefore, a separate charge in regard to Count 36 was not necessary. [N.T. 8-92 to 95, 99.]

It is appropriate at this juncture for the Court to note that, while the *Griffin* prohibition commonly arises in the consideration of those situations where the defendant is the sole witness available, there can be situations where, even if other witnesses are available, a questionable comment is so strong and so direct that it can only be understood to be a comment on the failure of the defendant to testify. For example, in *Berryman v. Colbert*, 538 F.2d 1247 (6th Cir. 1976), the prosecutor made the following remark during his closing speech:

> Now, finally, to establish the robbery murder, the felony murder, we are relying almost entirely upon circumstantial evidence. Nobody was there when the robbery took place. Nobody that we can bring here to testify. *The defendants here, yes, but we can't get them to testify.*

538 F.2d at 1249 (emphasis in original). No other meaning could be attributed to that remark other than that it was a clear, direct and gratuitous reference to the defendants' failure to take the stand and the prosecutor's inability to do anything about it, thus placing the solution to the evidentiary vacuum squarely on the defendants' shoulders. Such a statement, by its own terms, can have only the meaning barred by *Griffin*. *See also Eberhardt v. Bordenkircher*, 26 Crim.L.Rept. 2036 (6th Cir., filed Sept. 10, 1979) (the prosecutor's closing argument, as recapitulated by the court: "After criticizing the inadequacy of the defense witnesses, . . . reminded the jury indirectly but emphatically that the defendant had not taken the stand in his own defense. With this final argument, the prosecutor gestured toward the defendant."); *Rachel v. Bordenkircher*, 590 F.2d 200, 202 (6th Cir. 1978) (prosecutor remarked, "We will never know, these men won't tell us. The only other man who could tell us is dead and in his grave. . . ."); *U.S. v. Smith*, 500 F.2d 293, 295 (6th Cir. 1974) (prosecutor commented in his closing speech, ". . . I would ask that the defendants

satisfy you that there is no other reasonable explanation. If they have some reasonable alternatives to suggest as to what the calls mean, then I leave with you now, you then require them to show that to you."). These cases have no application here.

The language used in the Government's final argument in the case before us is, at the very worst, ambiguous if considered with a perception of all of the evidence heard by the jury and when viewed, as it must be, as a reasonable, accurate and permissible reply to defense counsel's challenge to the Government in their closing arguments that preceded the comments in question. Secondly, and quite aside from measuring the natural and necessary effect of a comment in a "sole witness" case or a direct-challenge case, courts have sought to make the measurement by consistently holding that any questionable remark by the prosecution, even if ambiguous, must be examined in the full panorama of statements made prior to the questionable remark and the evidence presented at the trial in order to accurately assess whether the natural and necessary effect of the comment was to demean the defendants' failure to testify at the trial, thereby causing the prejudice of *Griffin*. *See U.S. v. Dansker*, 537 F.2d 40, 63 (3d Cir. 1976) ("We think it clear that the prosecutor was merely highlighting the failure of defense counsel, in their summations, to challenge critical evidence against their clients . . . [defense counsel made no] effort to explain away this conversation in their closing arguments . . . the prosecutor was well within the bounds of legitimate advocacy."); *U.S. v. Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976) (the Government stressed credibility and lack of contradiction of own witnesses where contradictory testimony was available from defense witness); *U.S. v. Somers*, 496 F.2d 723, 741 (3d Cir. 1974) ("It is well settled that a prosecutorial misstatement made in response to, and in rebuttal of, an improper inference suggested by defense counsel will not result in reversible error.");

U.S. v. Bartemio, 547 F.2d 341, 346 (7th Cir. 1974) (remark dealt with evidence in record and credibility of witnesses); *U.S. v. Gimelstob*, 475 F.2d 157, 163 (3d Cir. 1973) (response by prosecution was directed to failure of defense counsel to cross-examine a Government witness and to attack by defense on credibility of Government witness); *U.S. v. Giuliano*, 383 F.2d 30, 34 (3d Cir. 1967) (general comment on Government's affirmative case is permitted); *U.S. v. Heithaus*, 377 F.2d 484, 486 (3d Cir. 1967) (defendants deliberately opened the door by attacking credibility of Government witnesses, therefore, justifying the response by the prosecution in an attempt to rebut the attack upon its evidence — fair rejoinder); *U.S. v. Gatto*, 299 F.Supp. 697, 703 (E.D.Pa. 1969) (comment on failure of defendants to offer proof is permitted).

In the present case, the Government contends that the remarks in question were made in response to the attack on the credibility of prosecution witnesses and to the argument of various defense counsel to the jury that the conduct of the Government witnesses was identical to the defendants' conduct and that no justification existed for the prosecution of the defendants while the Government witnesses were granted immunity. Throughout their closing arguments, three different defense attorneys emphatically and unmistakably challenged the prosecutor to articulate in his final argument, which they knew was about to be presented to the jury by the prosecutor, the difference in the behavior of the defendants on trial and that of the many witnesses called by the Government who had been false-but-immunized registrants. For example:

> Ladies and gentlemen, those who cooperated were immunized. Those who changed their testimony were immunized. You saw on the stand your very selves a person made an original statement and for all intents and purposes those statements were honest. The next thing you know, the FBI is in and

they didn't like that statement; they switch the statement and the next time they testified at the Grand Jury, the statement changed again. They came into court, the statement changed again under cross-examination, the tool of the defense.

Ladies and gentlemen, this case has been manipulated and conglomerated. People changed their testimony because they didn't want to be prosecuted. They weren't criminals. "How could I be a criminal; I didn't do anything wrong."

Every witness came in here and said that to you: "I didn't know I was doing anything wrong." Yet they came in and they got immunity. It doesn't make sense. It doesn't make sense and there is only one way to stop this and I started to suggest it and I got excited, but there is only one way to stop it, and that's a not guilty, ladies and gentlemen.

Let the Government know that, to use their money for things of importance. But to pick some people out is wrong. You heard it. Think about that testimony. Think about how all those witness came on here and changed it all around: The first time, the Pennsylvania Crime Commission was one thing. The next thing, it is the FBI; another thing.

N.T. 7-43, 44 (closing statements of counsel for defendant Lombardo).

Now, [the prosecuter] made seven suggestions as to what the circumstances may be to lead you to believe and to conclude that these defendants acted criminally.

I would like to for a moment submit to you ladies and gentlemen that if indeed the defendants' behavior is criminal, then the behavior of all the Government witnesses was equally criminal.

Now, that being true — and you have heard testimony from perhaps 10 or 15 witnesses for the Government who were virtually in the same legal

position as these defendants — you all remember that, I assume. Now, you have got approximately 20 or 25 people who are in this alleged state of criminal mentality.

N.T. 7-49, 50 (closing statement of counsel for defendant Asnes).

When the witnesses, the Pisanos, husband and wife, agree, "We did it," no problem; the Government let's them go.

The Middletons, "I voted twice, once here and once in New Jersey," same election, registered twice, no problem, let them go.

The Donaldsons, same thing, no problem, let them go.

But Anthony Fiorentino, the construction worker, the ironworker, "Get him. He must be guilty. He lives in South Philadelphia. Let's get him."

This is horror. This is horror. Jack Meyerson, the United States Attorney, the Special Prosecutor for this, said "He lied." Wasn't that his action, "Anthony Fiorentino lied?"

He lied? You have heard what Anthony has said, what has been said.

To quote the scripture to you, "He who is without sin, cast the first stone."

N.T. 7-58 (closing statement of counsel for defendant Fiorentino).

The Court, having been in the presence of the jury during the entire trial and having seen, heard and perceived all of the evidence, finds that, first, the remark was intended to be and was a fair response to an attack by the defense on the credibility of nearly all of the Government's witnesses. The defense had posed to the jury the question as to why these witnesses changed their testimony from prior

pre-indictment statements to the FBI, the grand jury and other authorities after being immunized. The Government, being invited to respond, was entitled to respond and did so by stating that, unlike the defendants in this case, the immunized witnesses decided, perhaps relunctantly, to "come clean" and admit that they had lied during the two-year inquiry by the various federal, state and local investigating authorities about their registering to vote. The thread of this pre-indictment pattern of lying to the investigating agencies leads directly to the second response included in the Government's rebuttal comments regarding the challenge raised with the jury by the defense as to why these defendants were on trial while various Government witnesses who had committed identical acts with a similar state of mind were granted immunity. The Government attempted to answer this defense thrust in its rebuttal by acknowledging that the witnesses who were immunized had some similarities and some dissimilarities with the defendants on trial. It was pointed out that both had previously lied, said nothing or "stonewalled" *prior to indictment* and that the trial evidence proved it. The reference was to the giving of false information to register to vote, in interviews by either the FBI, the Pennsylvania Crime Commission, Philadelphia Voters Commission or in questioning before the federal grand jury. The evidence, the Government argued, clearly reflected the failure to tell the "whole truth" and the various inconsistencies between the defendants' prior pre-indictment statements and the evidence as presented through the testimony of witnesses at trial.[16] However, unlike the defendants,

16. The following exemplify inconsistencies or failures to tell the "whole truth" between the defendants' pre-indictment statements to the various authorities and the evidence as revealed at trial, to which the Government was referring: (1) Defendant

the Government's immunized witnesses, in effect, had "come clean" and eventually told the truth "before the grand jury" as the Government stated. [N.T. 8-14.] They admitted making prior false statements or omissions of truth to the various authori-

NOTE 16 — *(Continued)*

Cianciulli told the Philadelphia Voters Commission that the Donaldsons and John Lombardo lived at 1427 South 6th Street [N.T. 2-133] but, when he talked to the Pennsylvania Crime Commission at a later date, he said he was not familiar with those persons [N.T. 2-145, 147, 149]. He also told the Pennslyvania Crime Commission that George Daly lived at that address but, at the trial, Daly testified that he had never lived at that address [N.T. 2-43, 45 — Daly said Cianciulli gave him an address from which to register and that he had never lived at the address]. Further, Salvatore Cannastraci, a resident of 1427 South 6th Street, testified that the Donaldsons, Lombardo and Daly never lived at that address [N.T. 1-162 to 165]. Defendant Cianciulli also told the Philadelphia Voters Commission that Joan Donaldson lived at the 1427 South 6th Street address [N.T. 2-133] but later to the Pennsylvania Crime Commission that he was not familiar with Joan Donaldson [N.T. 2-145, 147, 149]. At the trial, Joan Donaldson testified that she had never lived at the above address but that Cianciulli had helped her to register to vote and told her to use the above false address as her address on the voter registration form [N.T. 2-107, 110, 111]; (2) Defendant Ricca told the FBI that he lived at the 1427 South 6th Street address at the time he registered to vote on a "couple" of occasions but never intended to move from his other permanent address and that he registered to help Cianciulli [N.T. 5-31, 32]. At trial, his counsel took the position that he lived at that address for purposes of establishing his eligibility to vote [N.T. 7-63 to 66]. As will be discussed later, under Pennsylvania law, in order to establish a voting residence a person must intend to make that address his or her permanent address and abandon the prior address. Ricca also told the FBI that he had not suggested to William Romanini ("Romanini") that he register for Cianciulli using a false address [N.T. 5-34, 35]. At trial, Romanini testified that Ricca had asked him to register for Cianciulli and that Ricca gave him his voter registration card, after being mailed to Ricca's address, even though Romanini told Ricca that he thought what he was doing was illegal [N.T. 1-188, 190, 218]; (3) Defendant Lombardo told the FBI that Cianciulli had not filled out his voter registration form but some girl had and that Cianciulli was not even present at the time it was filled out [N.T. 3-91]. At trial, an FBI handwriting expert testified that Lombardo had signed his registra-

ties.[17] The fair and reasonable meaning that can be attributed to the Government's comment concern-

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tion form, but that Cianciulli had filled out the form based on a comparison of handwriting exemplars [N.T. 6-120, 127, 131 to 133 (Hallet)]; (4) Defendant Fiorentino told the federal grand jury that he had never lived at the address from which he had registered [N.T. 4-217], but there was evidence at the trial that he had made a prior statement to the Pennsylvania Crime Commission that he had in fact lived at the address from which he had registered to vote [N.T. 4-266]. At trial, the owner of the house from which Fiorentino had registered testified that Fiorentino had never lived at that address [N.T. 4-91 (A. J. Fannelli)]. Also, an FBI handwriting expert testified that Fiorentino had signed his own registration form [N.T. 6-134]; and (5) Defendant Asnes, when interviewed by the Pennsylvania Crime Commission, told them that he had lived at 1429 South 6th Street for one year before the interview on June 23, 1977, but later, in the same interview, told them that he lived there the past three months [N.T. 4-257, 259]. Later, when he talked to the FBI, he said that he never lived at that address and admitted to the FBI that he had previously lied to the Pennslyvania Crime Commission [N.T. 5-37, 41, 74, 75]. At the trial, the owner of the above address said he was not sure if Asnes had ever lived at that address, although the owner had previously told a federal grand jury that Asnes had never lived at that address [N.T. 6-74 (J. Berti)]. Also at trial, an FBI handwriting expert testified that in his opinion Asnes had signed his voter registration form that contained the 1429 South 6th Street address as his place of residence [N.T. 6-124, 125, 131].

17. For example, see the trial testimony of the following Government immunized witness Charles Lynch [N.T. 1-232, 234] — admitted that he had never lived at the address from which he had registered to vote and that he also lied as to his period of residence at that address; William Romanini [N.T. 1-198, 229, 230] — admitted that he lied to the Pennsylvania Crime Commission and the federal grand jury and that he had never lived at the address from which he had registered; George Daly [N.T. 2-38, 49 to 51, 56 to 58] — stated that he had lied to the Pennsylvania Crime Commission and the FBI but said he told the truth to the federal grand jury at a later date — also stated that he never lived at address from which he registered: Kenneth Donaldson [N.T. 3-28, 40] — lied when registering about address and period of residence; Charles Wadsworth [N.T. 3-105] — admitted he gave false address to register; Theodore Barone [N.T. 3-196, 206] — stated he gave false address to register to vote; Carmen Pungitore [N.T. 4-57, 59, 60] — admitted he never lived at

ing "coming clean" is that, unlike the immunized wrongdoers who repented pre-indictment, the defendants had not "come clean" during the pre-indictment inquiry, either before the grand jury or in interviews with the various authorities. These inconsistencies and failure to tell the "whole truth" were shown at trial by the evidence.

The Court finds that this was a fair, responsive and invited argument by the Government offered to meet its burden of proof and give the jury the response it was entitled to expect in the face of the questions raised by the defense in their closing arguments. It should also be noted that this position of the Government was not first presented in its rebuttal argument but had been raised and emphasized throughout the trial, beginning in its opening statement to the jury.[18] The inconsistencies were further emphasized by the Government in its closing

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NOTE 17 — *(Continued)*
address from which he registered; Angelo Sannutti [N.T. 4-63, 70, 71, 76] — said gave false address to register and false period of residence and that he lied to the Pennsylvania Crime Commission; Richard DeAngelis [N.T. 4-79, 80] — admitted he gave false address and period of residence; Nicholas Pisano [N.T. 4-97] — stated at trial he did not live at address from which he registered; Joanne Pisano [N.T. 4-110, 112, 115] — stated she did not live at address she registered from and gave false period of residence. Walter Middleton [N.T. 4-120, 129] — never lived at address registered from and gave false period of residence; Elaine Middleton [N.T. 4-158] — did not live at address registered from; Elizabeth Pisano [N.T. 4-201, 202] — stated she never lived at address from which she registered and also lied as to her period of residence there.

18. In particular regard to defendant Cianciulli's failure to tell the "whole truth" to the Philadelphia Voters Commission and the Pennsylvania Crime Commission prior to indictment, the Government, in its opening to the jury, stated:

> You will hear Mr. Maressa who works for the Philadelphia Voters Commission, who was just doing a routine check, a street list, which is made up from the registration list, who went to 1427 South Sixth Street in December of 1975 and talked to Matt Cianciulli about who of the people registered

remarks to the jury when, in a defendant-by-defendant analysis, it was pointed out that prior pre-indictment statements of the defendants were contrary to the evidence presented at trial and how various defendants had, therefore, been proven to have not told the "whole truth" to the various authorities prior to the indictment.[19]

The present case is closely and analogous to the case of *U.S. v. Heithaus*, 377 F.2d 484 (3d Cir. 1967), where the court stated: "By deliberate choice the defense focused attention (upon a particular issue in the case) . . . The prosecutor did no more than rebut this attack upon his evidence by reminding the jury in general terms that the testimony in question was uncontradicted

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from that address lived there. You will hear Maressa tell you what Matthew Cianciulli said and he will tell you that Matthew Cianciulli told him that people lived in that address, who the evidence will show clearly did not live at that address.

You will hear further from James DeBalt of the Pennsylvania Crime Commission who likewise questioned Matthew Cianciulli about the people at 1427, and you will hear evidence that Matthew Cianciulli indicated that people live there who did not live at that address or who had moved out of that address when they had, in fact, never lived there.

N.T. 1-36.

19. N.T. 7-16 to 22, 26. Exemplary of this prosecutorial strategy was the following statements by the Government in its closing statement:

The fourth factor that suggests that, indeed, these defendants did not honestly believe that what they were doing was proper is that each of them at some point in time did not come forward and candidly and truthfully tell authorities what had occurred. You know, after the fact, when we get into courtrooms, there is often a gloss put over earlier activities: "Yes, we cooperated with the authorities," and, "Yes, we came forward and said we honestly believed that you could register where you didn't live."

That's not what occured in this case.

Let's take the defendants one by one. . . .

N.T. 7-16.

and unimpeached. Such comment was a fair rejoinder that had been invited by the defense." 377 F.2d at 486. Similarly, here the defense opened the door by raising a challenge to the Government to answer the question of why the defendants were on trial when certain Government witnesses who had committed the same acts were not. The Government simply offered a fair rejoinder to that challenge in an effort to answer the question raised and thereby avoid the possibly harmful situation of leaving the defense's question unanswered.

The prosecutorial decision to stress prior inconsistent statements or pre-indictment silence is permissible under the holding of *Doyle v. Ohio*, 426 U.S. 610 (1976), relied upon by the defendants. In *Doyle*, the Supreme Court held that comments at trial by the prosecutor, concerning the silence of the accused after arrest when questioned by law enforcement authorities, was violative of the Fifth Amendment right against self-incrimination. The *Doyle* rule, however, did not extend to comments concerning the silence of the accused or inconsistencies in his statements *prior* to indictment or arrest. These latter types of comments were expressly authorized in *U.S. v. Chaney*, 446 F.2d 571 (3d Cir. 1971). There, the prosecutor commented in his closing arguments on the defendant's failure to mention certain important information in a prior pre-arrest interview with the FBI. At trial, this important information was disclosed by the testimony of various witnesses and that tended to indicate an unexplained silence on the part of the defendant prior to arrest. The *Chaney* court held:

> The statements of the prosecutor which are objected to came during a long review by him of the events occurring around the time of the robbery and the contradictions between what defendant told the FBI agent and the testimony of various witnesses. Viewed in the context of the prosecutor's entire address, we think it clear he was charging that defendant Chaney lied by not mentioning Sheppard.

> We do not think those statements, in this situation, even though phrased in the present tense, were such as would lead the jury to conclude that the prosecutor was commenting on the failure of the accused to testify. *See* Hayes v. United States, *supra; cf.* United States v. Smith, 421 F.2d 1229, 1230 (3rd Cir. 1970).

446 F.2d at 576.

The instant case can be favorably compared with the *Chaney* decision. Here, the prosecutorial commentary regarding the silence of certain defendants, on their not telling the "whole truth" and on their lying — characterized by the Government as "stonewalling" — to the authorities to prevent them from reaching the kernel of the scheme prior to indictment, is virtually identical to the facts in *Chaney*. For example, when questioned by the FBI, defendant Lombardo was asked if Cianciulli had filled out his voter registration form, to which he replied in the negative, and stated that a girl unknown to him had filled out the form and that defendant Cianciulli was not even present. [N.T. 3-91.] At trial, it was shown through an FBI handwriting expert, using handwriting exemplars of the defendants, that *Cianciulli* had filled out Lombardo's registration form. [N.T. 6-120, 127, 131, 132.] Lombardo's failure to tell the "whole truth" to the FBI constituted "stonewalling" and is representative of the "stonewalling" of the defendants prior to indictment. Another example is that of defendant Cianciulli's pre-indictment failure to tell the Pennsylvania Crime Commission and the Philadelphia Voter Commission that he had filled out numerous registration forms for persons who had never lived at the 1427 South 6th Street address, as was stated on the form.[20] In addition, the Government,

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20. N.T. 2-133, 145, 147 to 149. At trial, many of the persons Cianciulli had previous reported to the authorities as having lived at the 1427 South 6th Street address testified that they never lived at that address and that it was Cianciulli who had given them the false

by emphasizing these failures to tell the "whole truth," was responding to or attacking the position taken by the defendants throughout the trial that the defendants had

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NOTE 20 — *(Continued)*

address from which to register to vote [N.T. 2-43 (Daly)] [N.T. 2-107, 110, 111 (Joan Donaldson)].

This failure to tell the "whole truth" to the various authorities prior to indictment being a form of "stonewalling" or silence by failure to tell the "whole truth," was referred to by the Government earlier in its rebuttal argument as to defendants Ricca and Cianciulli when it stated:

> Is there a difference between the 20 or so Government witnesses you heard from and some of these defendants?
>
> Let's talk first about Mr. Cianciulli and Mr. Ricca.
>
> Now, with regard to the Government's witnesses, they registered once. They registered at an address at which they didn't live. That's the extent of their knowledge of what was going on.
>
> But that's very different from the knowledge that Mr. Cianciulli had. Mr. Cianciulli knew that literally dozens of persons were registering from an address at which they didn't live.
>
> Mr. Ricca, he knew that his employees, Romanini, Aldinger, Wadsworth, Russell, his relatives, Mike Ricca, John Lombardo, Vincent Lombardo, Rafael Norcisa, he knew that they were all registering from addresses at which they didn't live.
>
> It is very different to know about one registration and to see the whole pattern as Mr. Cianciulli did and as Mr. Ricca did. So clearly they are in a very different category from the Government's witnesses themselves.
>
> Well, how about the other four defendants?

N.T. 8-11.

> But think for a minute. The very fact that these people came into this courtroom and flipped on their grand-jury testimony because they didn't want to hurt Mr. Cianciulli and others shows that they did, in fact, know that what had gone on was wrong. The fact that these witnesses like the defendants earlier gave false statements to the FBI and authorities again shows a consciousness of guilt.

N.T. 8-12.

> I strongly dispute the fact that because you say something to law enforcement it necessarily means you have got nothing to hide.

in fact cooperated with the various authorities and did not try to hide or conceal important information.[21]

Turning to the Government's use of the phrase, "[t]heir stonewalling has *persisted* throughout this

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If the inspector from the Registration Commission had gone out to see Mr. Cianciulli and said, "I'm here to ask you about certain people who live here," and Mr. Cianciulli did not talk to him, obviously that would be an awareness that Mr. Cianciulli was involved in something wrong. But he talked to him and he lied to him. The only way it is valid to talk about candor is if they were entirely truthful. If they are not truthful, it is a coverup. The mere fact you talk doesn't mean you don't have something to hide.

Each of the witnesses in this case when they were on the witness stand were asked the question, "Examine that form, and what, if anything, is false about it?" They all examined the form. They looked at the form. They said, "The address is false." They knew what was wrong with the form. They knew where they told earlier lies to the FBI. They knew why there were at best reluctant Government witnesses — because they were not terribly anxious to point the finger at Mr. Cianciulli and others for the crime of false registration.

N.T. 8-13.

21. For example, *see* opening statement of attorney for defendant Cianciulli [N.T. 1-43, 44]; opening statement of attorney for defendant Lombardo [N.T. 1-48]; closing statement of attorney for defendant Asnes [N.T. 7-46, 47]; closing statement of attorney for defendant Ricca [N.T. 7-72 to 74]; closing statement of attorney for defendant Cianciulli [N.T. 8-112]. Typical of this defense contention was the following statement by Cianciulli's attorney:

The Government argued to you that he confessed, I suppose, or he gave inconsistent statements to investigators. Nothing could be further from the truth. The very fact that Mr. Cianciulli talked to investigators is indicative of something. If you had committed a crime and you heard there was an investigation, investigators came out to see you, if you were the skilled, evil politician that they say Mr. Cianciulli is, who is dealing in the back room, would you sit down and talk to investigators?

In fact, when he talked to one investigator, Mario Rissa, he told him that certain people no longer lived there. They were then struck from the voting list as a result of that. If Mr. Cianciulli was really out to get those 18 or 20 votes, he never

trial," we find that it was a comment on the cumulative appearance of several of the Government witnesses, many of whom had been immunized, but who were nevertheless reluctant to testify at trial against the defendants. This reluctance was evidenced by inconsistent testimony of these witnesses and general lapses of memory as to critical facts that an unindicted witness should or could have remembered.[22] In this context, the prosecutor said the following regarding these witnesses, in the

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NOTE 21 — *(Continued)*

would have told them that. He would have tried to grab every vote he could.

Basically all the defendants in this case talked with the FBI, told them the truth. Doesn't that tell you something? When a person is guilty of something, he runs and hides. He goes and gets an attorney and says, "Go talk to the FBI." He doesn't show up and say, "Sure, I'll talk to you, what do you want to know? Sure, I'll come to the Grand Jury." Almost everybody came to the Grand Jury and talked.

N.T. 8-122.

22. Representative examples of witnesses who were called, and in some cases immunized, but who "stonewalled" at the trial, out of an apparent desire to hold back anything that could possibly help the prosecution, included the following: (1) Joseph Berti, owner of 1429 South 6th Street residence, testified at trial that he was not sure if defendant Asnes had ever lived at his apartment house, although before the federal grand jury he had previously testified that Asnes had not lived at the address [N.T. 6-64, 74]; (2) Anthony Pisano, immunized witness, had told a federal grand jury that Cianciulli had given him the address with which to register but, at trial, he said that he was not sure it was defendant Cianciulli who had given him the address [N.T. 4-187 to 189]; (3) Josephine DiMento, owner of 538 Wilder Street and who was also majority inspector in the 1st ward of the 13th division in the 1976 general election, had prior to trial told a federal grand jury that people had voted in that division who were registered from the address at which she lived but that they did not live there. At trial, she was unclear on this occurrence and generally evasive in answering questions. She had also told the prosecutors prior to trial that it was standard practice to check the addresses of the voters before they voted at the polling place, but at trial she said this was only done in rare cases when they were not sure if the person really lived at the

rebuttal argument leading up to his "stonewalling" remark:

> Let's remember a couple things about these Government witnesses: Yes, the Government called them pursuant to subpoena, but as you yourself saw, many of them were very reluctant guests at this party. Had it not been for the fact that they had previously testified before the grand jury you would not have seen the full truth of their testimony. Fllows [*sic*] like Ken Donaldson, Charles Salerno, Josephine DiMento, Mr. Cianciulli's relatives, the Bertis, they came into court and had lapses of memory. They couldn't remember who lived next door until they got on cross-examination. Then when Mr. Miller or one of the other defense attorneys got up here and asked them questions, on cross-examination, it was, "Yes, that's right, Mr. Miller."
>
> "Yes, that's right, Mr. Pomerantz."
>
> The defense was basically able to put words in their mouths. And the reason that happened was they weren't necessarily sympathetic to the Government. They were more sympathetic to the defense.

N.T. 8-12.

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address that was claimed [N.T. 4-235, 237, 241, 244, 245, 250]; (4) Kenneth Donaldson, immunized witness, had told the federal grand jury that Cianciulli had helped him straighten out a parking ticket problem, but at trial claimed that it was an eviction problem. Also, before the federal grand jury he said that Cianciulli had given him the false address with which to register to vote, but at trial he at first denied this was true and then, later in the trial, remembered that it was indeed Cianciulli. Finally, before the federal grand jury, Donaldson said that he had never lived at the 1427 South 6th Street address from which he registered, but at trial he claimed that he was intending to move to that address because of eviction problems prior to his registration. However, later during the trial, he admitted that he had lied when he claimed on the voter registration form that he had resided at the 1427 South 6th Street address for two months [N.T. 2-80 to 89; 3-24, 28, 36].

Whether these witnesses were in fact "stonewalling" by reason of prior affiliations or current allegiances to any of the defendants was not a question for the Court to answer, but was rather a question the jury had a duty to consider in its search for the truth. The critical issue is whether the Government was attempting to meet this circumstance by urging the jury to determine whether these *witnesses* had "stonewalled" during the trial, as opposed to implying that the *defendants* themselves had "stonewalled" by refusing to testify. The Court finds that the *former* was the natural and necessary conclusion that the jury would come to. This is clear when the Government's initial rebuttal remarks, quoted above, are read in conjunction with the later "stonewalling" reference and within the context of the totality of the trial.

Finally, the Government's rebuttal remark that "stonewalling" was "persisting" throughout the trial should also be considered in connection with a point raised in its closing statement to the jury. The Government referred to defendant Cianciulli's attempt to conceal his true handwriting characteristics in the furnishing of his handwriting exemplar. The hardwriting exemplar, a non-testimonial statement submitted during trial, was used by an FBI handwriting expert. The Government in its first address to the jury stated:

> The fifth factor that I would point out to you — and again, with reference to Mr. Cianciulli — that he did not honestly believe it was proper to register where you didn't live is his dictated handwriting sample, and by "dictated handwriting sample," we mean this portion of Government's Exhibit 48-D, the upper left-hand corner.
>
> Now, remember, Agent Lovelace took the stand and testified that, "Before I took that sample from Mr. Cianciulli I told him that the purpose of the sample was that it was going to be analyzed by the FBI and compared with certain voter-registration affidavits."

> Remember what the handwriting expert said about this dictated sample? He said — and I am quoting his very words — that it was not the normal style of handwriting, that it appeared to be primitive sort of stick figures.
>
> Well, what happened is Lovelace told him what the handwriting sample was going to be used for. Cianciulli then came forward with what was not the normal style of handwriting, and in an effort to cloud the FBI's investigation, another consciousness of guilt.
>
> Fortunately, the FBI had 72 previous samples of Cianciulli's handwriting when he was relaxed and it was his normal style of handwriting, and on that basis we were able to bring before you the handwriting analysis that we did.

N.T. 7-22

In conclusion, this Court finds that the questionable remarks of the Government in its rebuttal argument did not naturally and necessarily have the effect of constituting a comment on any of the defendants failing to testify, when considered within the totality of the trial proceedings, but rather the remarks constituted: (1) a response to the challenge raised by the defense in their closing arguments concerning the credibility and immunization of several Government witnesses; (2) a reaffirmation of the prosecutorial strategy employed throughout the trial of presenting the inconsistencies and omissions in the defendants' pre-indictment statements and in the evidence at trial; and, (3) a commentary on the "stonewalling" of the defendants that "persisted" throughout the trial — first, by the failure of the defense in general to present affirmative or rebuttal evidence and, second, indirectly through the apparent reluctance of certain immunized Government witnesses to testify against the defendants at trial and, third, by defendant Cianciulli's attempted alteration of his handwriting in an exemplar submitted during trial.

Lastly, courts in these cases often consider the merit of using curative instructions to the jury. The late Chief Judge William H. Hastie, writing for the Third Circuit Court of Appeals, states in *U.S. v. Heithaus, supra,* that:

> If some juror was thus reminded that the defendant had not testified, the court's subsequent instruction concerning the jury's duty to disregard the failure of the accused to testify minimized the risk of inferring guilt from such failure. On the facts of this case, the defendant was entitled to no more. . . .

377 F.2d at 486. *See also U.S. v. Waller, supra,* slip op. at 5; *U.S. v. Dansker, supra,* 537 F.2d at 63; *U.S. v. Chaney, supra,* 446 F.2d at 576; *U.S. v. Giuliano, supra,* 383 F.2d at 34-35; *U.S. v. McCrae,* 344 F.Supp. 942, 946 (E.D.Pa. 1972), *aff'd,* 475 F.2d 1397 (3d Cir. 1973); *U.S. v. Gatto, supra,* 299 F.Supp. at 703.

The inquiry to be made by the Court here is whether a cautionary instruction can safely be said to have eradicated the possible effect of a prosecutor's questionable remark. The standard to be applied was articulated in *U.S. v. Smith,* 500 F.2d 293 (6th Cir. 1974):

> The inquiry . . . must always be whether in the view of the whole record the impression conveyed to the minds of the jurors by irrelevant and prejudicial matter is such that the court may fairly say that it has not been successfully eradicated by the rulings of the trial judge, his admonition to counsel, and his instruction to the jurors to disregard it.

500 F.2d at 297-298, *quoting Pierce v. U.S.,* 86 F.2d 949, 952 (6th Cir. 1936). With this standard as a guide, we find that the Court's admonition in the charge had the effect of dispelling any prejudicial effect caused by the Government's remarks.

First, contrary to the assertions of the defendants,[23] the Court did in fact give a prompt and complete instruction on the duty of the jury not to draw any unfavorable inference from the fact that the defendants had not testified. The Court stated in its charge to the jury:

> It is a constitutional right of a defendant in a criminal trial that he should not be compelled to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or offering any witnesses or producing any evidence of any kind. No lack of evidence on a defendant's part will rectify a failure of proof by the prosecution.

N.T. 8-91, 92.

This curative instruction was given as part of the Court's charge at the close of the case and immediately following the Government's rebuttal argument to the jury containing the questionable comments. Furthermore, the curative effect of the Court's instruction was further strengthened by several references of defense counsel during their closing speeches concerning this very same right of the defendants not to testify. Defense counsel said:

> I suggest to you it is not the burden of Mr. Lombardo to tell you where he lived. It's the Government's to tell you where he lived, to show that he didn't live where he said he lived if he had said anything. And he doesn't have to say anything. The Government must prove its case.
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> * * * *

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23. *See* defendant Cianciulli's Supplemental Memorandum in Support of Post-trial Relief Relating to Improper, Unconstitutional Comments by Prosecutor Touching on Defendant's Failure to Testify, at 2.

> . . . [Y]ou may not draw any negative inference from one's failure, if you can call it a failure — and it shouldn't be considered a failure — base use of words for me — to take the stand. My client didn't take the stand and he couldn't — and he didn't take the stand because he has the right not to. He has a right to sit there and let the Government prove its case.
>
> And because you don't know what his educational background is, he is not a professional witness. I mean, you can look at him. I suggest he is not a professional witness. And I suggest to you that he may not have been able to come up there and be like someone who comes on the stand frequently, like an FBI agent or a professional handwriting expert.
>
> * * * *
>
> And you may not — and the judge will tell you you may not — and you have to maybe work hard not to be negative about the fact he didn't take the stand. But that's your responsibility as a juror. You must take that responsibility seriously . . .
>
> There has been an evolution in this country of the law, and you know that law, and that says you can't say anything negative about this man for not taking the stand.

N.T. 7-38 to 40 (closing argument of counsel for defendant Lombardo).

> Like Mr. Pomerantz said in his statement, there are many, many reasons why a defendant may not choose to take the witness stand. I am not going to explain them all to you. I don't think it is necessary. Because the only thing you really have to consider is what proof has been presented to each of you as to every element of the crime.

N.T. 7-47 (closing argument of counsel for defendant Asnes).

A similar situation arose in the case of *U.S. v. Giuliano*, 383 F.2d 31 (3d Cir. 1967), where the defense attorney stated in his closing argument to the jury:

> I want to at this time make note of the fact, and I know you are possibly concerned with the fact that the defendant did not take the stand. *This honorable Court will tell you in so many words that the law does not compel a defendant in a criminal case to take the witness stand and testify.* And no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. I wanted to satisfy your minds on that point because it possibly was bothering you.

383 F.2d at 32 (emphasis in the original). The curative effect of this remark was considered by the *Giuliano* court as a positive factor to support its holding that statements of the prosecution did not violate the *Griffin* rule:

> His own lawyer had reminded the jury of exactly that same thing; had further told the jury that the judge would instruct it that the defendant had the unquestionable right to remain silent. . . .

383 F.2d at 34.

It should also be noted that the Court strongly emphasized this principle in the *voir dire* of the panel from which the ultimate jury was selected:

> Also, in every criminal case a defendant has the absolute right, any defendant has the absolute right not to testify, not to offer evidence in his own behalf of any kind. That is, a defendant under our system has the right when charged with a crime, these crimes or any other crime, to come to court with his counsel and remain silent and say nothing.
>
> Why? Because the burden of proof, the burden of proving guilt in the United States of America, is on the prosecution. That's our system.

> In some countries the burden of proof is on the defendant to explain yourself. We don't have that system in America.
>
> So that means a defendant who is charged with a crime can remain moot [*sic*], so to speak, and simply sit there and say nothing.
>
> But the important part for jurors is that that cannot be held against him. A juror can't say, "Oh, well, he didn't get up and say anything; he must be guilty." That's not our system.
>
> Now, these defendants all have attorneys and there may come a time in the case when they'll decide if they want to testify or not testify and they may not know that now. But after they talk to their attorney, a defendant may decide, "I will not testify; I am prepared to stand mute."
>
> If any of these defendants would do that, would anyone here hold that against them?

N.T., partial transcript — *Voir Dire*, at 59-60. No negative responses were made to the question posed by the Court. Additionally, the Court repeatedly stressed that any instructions on the law were the sole province of the Court.[24] The defense attorneys themselves further reiterated this important concept to the jury in their closing arguments,[25] with the consequence that it was perfectly plain to the jury that, to the extent that any counsel's statement on a legal principle differed with the Court's, the jury was to follow the Court. It is reasonable, absent clear evidence to the contrary, to presume that jurors listen to, understand and heed the clear and concise instructions the Court delivers during the course of a trial. *See Eberhardt v. Bordenkircher*, 26 Crim.L.Rept.

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24. *Voir dire* of the jury panel by the Court, at 8, 9; Charge of the Court to the jury at N.T. 8-60 to 62.

25. N.T. 7-58 (attorney for defendant Fiorentino); N.T. 8-103 (attorney for defendant Cianciulli).

2036, 2037 (6th Cir., filed Sept. 10, 1979); *Hall v. U.S.*, 171 F.2d 347, 349-350 (D.C.Cir. 1949).

At post-trial oral argument, the defendants presented as an alternative theory the argument that, even if a curative instruction had been given, it could never be sufficient to cure the prejudicial effect of the Government's rebuttal remarks. This declaration of a *per se* principle is not supported by any decisional authority in any of the federal circuit courts of appeals. While it is true that, contrary to the holdings of the Third Circuit Court of Appeals, the First and Seventh Circuit Courts have adopted the view that curative instructions in some cases are insufficient, even these courts have created an exception to this strict rule, holding that prejudice may be cured if the curative instruction is given immediately and with strong and clear language. *See U.S. v. Flannery,* 451 F.2d 880, 882 (1st Cir. 1971); *U.S. v. Handman,* 447 F.2d 853, 855 (7th Cir., 1971); *Rodriguez-Sandoval v. U.S.*, 409 F.2d 529, 530 n.3 (1st Cir. 1969); *Desmond v. U.S.*, 345 F.2d 225, 226-227 (1st Cir. 1965).

In the present case, a curative instruction was never requested by any defendant at any time. One explanation for this was offered at post-trial argument by Cianciulli's attorney, who stated that he had not requested a curative instruction prior to the Court's charge because he "knew" that the Court would give one.[26] Counsel cannot adopt a defense strategy of failing to request a curative instruction based on what counsel thinks the Court might do, await a favorable verdict and then, if the verdict is unfavorable, claim (albeit incorrectly) that a curative instruction was never given. *See U.S. v. Waller,* No. 79-1211, slip op. at 5 (3d Cir., filed October 5, 1979) ("If counsel had objected and asked for a curative instruction, we are confident that such an in-

26. Statement of counsel for defendant Cianciulli at oral argument, as reflected in the Court's bench notes and Court Reporter's official notes (October 22, 1979).

struction would have eliminated any possibly adverse inferences.").

The Court notes that it consciously chose not to object *sua sponte* when the remarks were made, for fear of creating a problem where one did not exist. *See U.S. v. Smith,* 500 F.2d 293, 296 (6th Cir. 1974); *U.S. v. Flannery, supra,* 451 F.2d at 882; *U.S. v. Venable, supra,* 443 F.Supp. at 183. Instead, the Court chose to give a curative instruction in its charge which was delivered within a matter of minutes following the Government's rebuttal argument.

The curative instruction pinnacled the prior instructions by the Court and statements by defense counsel on the right of the defendant not to testify. Thus, by the end of the trial, this point of law was firmly engraved upon the minds of the jurors. This case goes far beyond any of the decisional law holding that a cautionary instruction alone would be curative of any prejudice caused by a prosecutor's misstatement. The Third Circuit Court of Appeals has consistently held that a curative instruction alone can cure the prejudice caused by a prosecutor's questionable remark. *See U.S. v. Waller,* slip op. at 5; *U.S. v. Giuliano, supra,* 383 F.2d at 34-35; *U.S. v. Heithaus, supra,* 377 F.2d at 486; *U.S. v. McCrae,* 344 F.Supp. 942, 946 (E.D.Pa. 1972), *aff'd,* 475 F.2d 1397 (3d Cir. 1973). In the instant action, the cumulative effect of numerous instructions and statements cured any possible prejudice that might have resulted from the Government's questionable remarks.

Therefore, the Court finds that, under the test set forth in *U.S. v. Smith, supra,* and even under the stricter test of *U.S. v. Handman, supra,* and *U.S. v. Flannery, supra,*[27] the cautionary climate created by the Court's

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27. The Court finds that the strictness of the test of prosecutorial intent of the First Circuit Court of Appeals in *Desmond v. U.S.*, 345 F.2d 225 (1st Cir. 1965), and *U.S. v. Flannery,* 451 F.2d 880 (1st Cir. 1971), is not as strict as might appear on an initial reading of these cases. For example, in *Flannery,* the court

voir dire instructions, the curative instructions within the charge to the jury, the other instructions throughout the trial and correct statements of defense counsel in their closing remarks, on the right of the defendants not to testify, had the natural and necessary effect of curing any possibility of prejudice that might have occasioned by the remarks of the Government in its rebuttal.

(2) *Intent*

The second part of the alternate test set forth in *U.S. v. Waller, supra,* was whether the prosecutor's comment was intentionally made. As has been so often cited as the

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strongly stressed that the only exception to the *Griffin* rule is if the court actually interrupts the prosecutor's argument immediately after the questionable remark is made and fully instructs the jury concerning the defendant's right not to testify. However, later in its opinion, the court made the following statement which indicates that it was "backing off" its strict position by conceding the dilemma that courts are faced with in this area:

> Defendant did not object, perhaps fearful of making the matter worse, and the court's failure to interrupt may have been for the same reason. The government had no right, however, to place the defendant in this dilemma.

451 F.2d at 882. It is also noted that in *U.S. v. Handman, supra,* the Seventh Circuit Court of Appeals was addresing a factual situation where the prosecutor's questionable remarks were made in his closing speech and not his rebuttal. Therefore, if the court would have waited until the charge to give a curative instruction, this would obviously entail a longer period of contemplative time than if the curative instruction was given in the charge that would immediately follow the Government's rebuttal argument. Whether the *Handman* court would have reached a different result as to the need for a prompt and immediate instruction if the remark had occurred in the rebuttal argument is unclear.

The strict test of *Flannery* was specifically rejected by the Sixth Circuit Court of Appeals in *U.S. v. Smith,* 500 F.2d 293, 296 (6th Cir. 1974), where the court held that any prejudical effect would be better neutralized by a cautionary instruction given at the close of the Government's argument instead of interrupting the argument, which might more dramatically impress on the jury the prejudicial effect of the remark.

wellspring of prosecutorial behavior, the statements of the United States Supreme Court in *Berger v. U.S.*, 295 U.S. 78 (1935), is our starting point:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aid of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. . . .

295 U.S. at 88. *See also Pierce v. U.S.*, 86 F.2d 949, 953 (6th Cir. 1936); *U.S. v. Smith*, 500 F.2d 293, 295-296 (6th Cir. 1974).

An examination of the cases in this area reveals that the issue of whether a comment was made intentionally only arises where no plausible or reasonable explanation is available to assess the meaning of the comments made. If there is no ostensibly proper matter which the remarks could pertain to, the only possible explanation available is that the remarks were intended to be a com-

ment on a defendant's failure to testify. In the present case, the Government's remarks in its rebuttal can be interpreted as: (1) a response by the Government to the challenge raised by the defense in their closing arguments concerning the immunized Government witnesses; (2) a reiteration of the prosecutorial strategy of making a general comment on the evidence by explaining the inconsistencies and omissions in the pre-indictment statements of the defendants and the evidence presented at trial; and, (3) commentary on the apparent reluctance of certain immunized witnesses to testify against the defendants at trial, and defendant Cianciulli to cooperate in submitting a handwriting exemplar during trial. Therefore, the Government's statements did not reach the depths of a gratuitous comment or a "stupid trick," as defined by the Third Circuit in *U.S. v. Giuliano, supra*, 383 F.2d at 34 (the prosecution's remarks "dealt with the Government's affirmative position and not with some completely stupid trick of advising the jury that the defendant had not testified in his own behalf."). *See also Rachel v. Bordenkircher*, 590 F.2d 200, 202 (6th Cir. 1978) ("It is apparent that the prosecution calculated these remarks to create in the jurors' minds an inference of guilt based solely on petitioner's election to remain silent."); *Rodriguez-Sandoval v. U.S., supra*, 409 F.2d at 531 ("Indeed, the very persistence of the government in making these remarks is proof that it attached much importance to them."); *Pierce v. U.S.*, 86 F.2d 949, 953 (6th Cir. 1936) ("Indulgence was designed rather than inadvertence, and improper purpose its only explanation. That is was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so.").

In this context, the Court notes that, on the day before the Government's rebuttal argument, the defense, after objecting to the Government's characterization of "uncontradicted" evidence in its closing argument, referred the Court and the attorneys to several federal

cases,[28] detailing the prohibition of *Griffin* and its progeny. The following day, the defense offered other similar cases[29] immediately prior to the Government's rebuttal argument. This notice or warning to the Government about the *Griffin* prohibition leads the Court to believe that the Government was aware of the prohibition articulated in *Griffin* prior to making its rebuttal argument. In light of the Government's otherwise proper conduct throughout the trial and the notice of the *Griffin* prohibition, the Court finds that the Government's remarks in its rebuttal argument were not intended to be prejudicial for the sake of prejudice alone, but were intended to be a fair and necessary response to legitimate factual issues.

This Court does not follow the strict approach taken by some other courts on the issue of prosecutorial intent. *See Rodriguez-Sandoval v. U.S.*, *supra*, 409 F.2d at 531 ("We do not say that the government was contumacious. It doubtless believed its remarks were at least arguably consistent with our decisions. But one who attempts to define exactly the edge of the precipice approaches at his peril."); *U.S. v. Handman*, *supra*, 447 F.2d at 856. This Court finds the above approach too restrictive and untenable, in light of the prosecutorial duties defined in *U.S. v. Berger*, *supra*, and the underlying reasoning of the Supreme Court in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), where the Court stated:

> The "consistent and repeated misrepresentation" of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance of the jury as a matter of opinion not of evidence, do not reach the

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28. *U.S. v. Venable*, 443 F.Supp. 178 (E.D.Pa. 1977).

29. *Linden v. U.S.*, 296 F. 104 (3d Cir. 1924); *U.S. v. Handman*, 447 F.2d 853 (7th Cir. 1971); *U.S. v. Flannery*, 451 F.2d 880 (1st Cir. 1971).

> same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

416 U.S. at 646-647.

The instant action differs in another important way from those cases where courts have granted mistrials due to the intentional comments of the prosecutor. In many of these cases, the comment concerning a defendant's failure to testify was not the only improper remark made by the prosecution during the trial, but exemplified simply one aspect of a course of impermissible conduct. Therefore, the cumulative effect of such a course of conduct has been held to naturally and necessarily prejudice the jury. *See Eberhardt v. Bordenkircher*, *supra*, 26 Crim.L.Rept. at 2036 (other trial errors adding to the cumulative prejudicial effect included introduction of mug shots and prosecutor's unfounded assertions that defendant's witnesses were being paid for their testimony); *Rachel v. Bordenkircher, supra,* 590 F.2d at 202 (prosecution also made references to petitioner's silence at the time of his arrest); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (a district attorney's comment that, "If you can't find the defendant guilty on these facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home," was deemed to be a "highly improper expression of personal opinion [and] constituted a veiled threat to the jury to return a guilty verdict."); *Pharr v. U.S.*, 48 F.2d 767, 771

(6th Cir. 1931) (further references by Government to "misfortunes of women, widows, and orphans resulting from wrecking of the bank were in no sense pertinent to the presentation of the issues of the case, and were highly improper.")

Finally, in *U.S. v. Venable*, *supra*, the prosecutor, on four separate occasions in his closing argument, made improper comments and ignored the narrow line of *Griffin* with "all the delicacy and silence of a piledriver." 443 F.Supp. at 182. *See also Kelly v. Stone*, *supra*, 514 F.2d at 19 ("repeated assertions" made); *Rodriguez-Sandoval v. U.S.*, 409 F.2d 529, 531 (1st Cir. 1969) ("The prosecution hammered the point home relentlessly, stating in at least five different ways that its version of the December 26 happening was uncontradicted."); *Pierce v. U.S.*, 86 F.2d 949, 953 (6th Cir. 1936) ("misconduct of the prosecutors was neither slight nor confined to a single instance, but so pronounced and persistent that the cumulative effect upon the jury cannot be disregarded as inconsequential."). These cases do not apply in the case *sub judice*.

B. *Comment Concerning "Uncontradicted" Evidence*

Defendants claim that remarks made by the Government in its closing argument, as to the evidence being "uncontradicted," was also violative of the *Griffin* doctrine. The comments objected to are as follows:

> Literally dozens of people registed from one particular division within the City of Philadelphia when they didn't live there. You have heard testimony from many of these voters that they did so at addresses furnished to them by Defendant Cianciulli or by Defendant Ricca and, indeed, that Government evidence has come before you and has been uncontradicted. . . .

N.T. 7-6.

The defendants rely upon the following decisions in support of their position that the use of the phrase "uncontradicted" is *per se* violative of the *Griffin* standard: *U.S. v. Flannery*, 451 F.2d 880 (1st Cir. 1971); *Desmond v. U.S.*, 345 F.2d 225 (1st Cir. 1965); *U.S. v. Handman*, 447 F.2d 853 (7th Cir. 1971); *Kelly v. Stone*, 514 F.2d 18 (9th Cir. 1975); *U.S. v. Nasta*, 398 F.2d 283 (2d Cir. 1968); *Barnes v. U.S.*, 8 F.2d 382 (8th Cir. 1925); and *U.S. v. Venable*, 443 F.Supp. 178 (E.D.Pa. 1977).

The defendants' contention is unstable for three reasons. First, as noted earlier, the rule in *Handman* and others was not that the use of the term "uncontradicted" was *per se* violative of *Griffin*. Rather, those courts held that a prompt and clear curative instruction by the Court would cure any possible prejudice. In the instant case, the cumulative effect of the Court's *voir dire* instructions, the remarks of counsel in their closing statement, other instructions of the Court throughout the trial and the Court's charge delivered immediately following the Government's rebuttal concerning the right of the defendants not to testify, all *in toto*, cured whatever prejudicial effect that the "stonewalling" and "uncontradicted" language might have had on the jury.

Second, the Third Circuit Court of Appeals has repeatedly adopted the position that the use of the term "uncontradicted" is permissible. This position was best expressed by the late Chief Judge William H. Hastie in *U.S. v. Heithaus*, 377 F.2d 484 (3d Cir. 1967), where he stated:

> By deliberate choice the defense focused attention upon the credibility of certain witnesses for the prosecution and urged the jury to disbelieve them. The prosecutor then did no more than rebut this attack upon his evidence by reminding the jury in general terms that the testimony in question was uncontradicted and unimpeached. Such comment

was a fair rejoinder that had been invited by the defense.

377 F.2d at 486.

This position has more recently been reaffirmed by the Third Circuit. *See U.S. v. Gimelstob*, 475 F.2d 157, 162 n.4 (3d Cir. 1973); *U.S. v. McCrae*, 344 F.Supp. 942, 947 (E.D.Pa. 1972), *aff'd*, 475 F.2d 1397 (3d Cir. 1973). Other circuit courts have also adopted this position. *See U.S. v. Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976); *U.S. v. Thurmond*, 541 F.2d 774, 776 (8th Cir. 1976); *U.S. v. Bartemio*, 547 F.2d 341, 345 (7th Cir. 1974); *U.S. v. Thompson*, 541 F.2d 774, 776 (8th Cir. 1976); *U.S. v. Taitano*, 442 F.2d 467, 468 (9th Cir. 1971); *U.S. v. Nasta*, 398 F.2d 283, 285 (2d Cir. 1968); *Carlisle V. U.S.*, 194 F. 827, 830 (4th Cir. 1912).

Obviously, these holdings do not allow the Government unbridled permission to use the word "uncontradicted" during the trial; but a reading of these cases shows the existence of other factors, viewed in the context of the entire trial, that justified the use of the word "uncontradicted" without offending the *Griffin* rule. *See U.S. v. Heithaus*, *supra*, (any possible prejudice was cured by the court's full and proper instruction); *U.S. v. Gimelstob*, *supra*, (comment was directed to the failure of the defendant's counsel to cross-examine a Government witness and was rebuttal to attack on Government witnesses' credibility); *U.S. v. McCrae*, *supra*, (a reference of failure of defense to produce witness to rebut Government's evidence and court's curative instruction cured any possible prejudice that resulted); *U.S. v. Armedo-Sarmiento*, *supra*, (was only response to argument raised by defendant's counsel and instruction cured in any case); *U.S. v. Thurmond*, *supra*, (instruction cured and evidence was overwhelming); *U.S. v. Bartemio*, *supra*, (not a sole-witness case because other witnesses available who could have challenged or contradicted the Government's evidence); *U.S. v. Thomp-*

son, supra, (not a sole-witness case so comment allowed because of the failure of defense to call witnesses to refute or contradict the Government's case); *U.S. v. Taitano, supra,* (charge of court cured any possible prejudice and no objection made by defense counsel to the remarks at the time they were made); *U.S. v. Nasta, supra,* (responding to argument of defense counsel, other witnesses available to refute Government's case, charge cured, evidence was overwhelming and no objection at time remark made but only motion for mistrial and no request for a curative instruction). Most of these factors have been previously discussed and are present in the instant action.

Lastly, as some of the aforecited cases show, the courts have held that the use of the phrase "uncontradicted" by the prosecution can be prohibited under *Griffin* "in the exceedingly rare case where the defendant alone could possibly contradict the government's testimony . . ." *U.S. ex rel. Leak v. Follette,* 418 F.2d 1266, 1269 (2d Cir. 1969). As previously shown, the defendants were not the only witnesses who could have contradicted the Government's evidence because other witnesses were presented or could have been presented by the defense.

The only Third Circuit decision holding that the use of the phrase "uncontradicted" was violative of due process was *Linden v. U.S.,* 296 F. 104 (3d Cir. 1924). In *Linden,* the trial judge, and not the prosecutor, made the following statement during the trial:

> *Now, as to that count there is very little to be said. If you believe the evidence, and there is no contradiction of it at all, these three men were caught in a boat on the Shrewsbury River, in what is called the Cove between the Highlands and Sandy Hook, with a lot of intoxicating liquor on board.* You heard the testimony with reference to that. *Now there is not any evidence at all in explanation of that transaction, and there you have the bare facts.*

296 F. at 105-106 (emphasis in original).

As a direct result, the *Linden* court held:

> Everyone accused of crime is presumed to be innocent until proven guilty. During the period of that presumption, one so accused may combat the evidence brought against him; or he may, if he choose, meet it in silence. That is his right. For its proection the law imposes corresponding silence upon prosecutor and court. Neither can validly refer or indirectly call attention to his failure to speak in his own defense. Being innocent in the eyes of the law, he is not called upon to meet accusing testimony by contradiction or explanation. Therefore, no presumption can lawfully be raised or comment lawfully be made upon his failure to do that which the law expressly says he shall not be required to do.
>
> The apprehension and arrest occurred at night, out in a stream. The only persons present were the three defendants and the two customs officers. The latter were witnesses for the prosecution. It follows, therefore, that the only persons who could possibly contradict their testimony were the defendants themselves. Obviously, then, the only persons to whom the learned trial judge could have alluded as not having contradicted the government's testimony and as not having given an "explanation of the transaction" were the defendants. This is so clear that it does not require discussion. We are of opinion that this part of the court's charge involved error and that the conviction thereunder was not valid.

296 F. at 106 (citation omitted).

The *Linden* decision can be distinguished from the present action in several respects. At the outset, *Linden* was a sole-witness case and later decisions have distinguished *Linden* on similar grounds. *See U.S. v. Giuliano*, 383 F.2d 30, 35 (3d Cir. 1967) (unlike *Linden*, there

might have been other witnesses available who could have been produced to contradict the Government's evidence other than the defendant); *Slakoff v. U.S.*, 8 F.2d 9, 11 (3d Cir. 1925) (other methods available to rebut Government's proof including presentation of documents, use of cross-examination, therefore, unlike *Linden* decision). Moreover, in *Linden*, it was the trial judge and not the prosecutor who made the remark. Therefore, any prejudicial effect such a direct remark might have otherwise had was further intensified because the person making the comment was the trial judge who sits in the role of the instructor of the law to the jury and whose comments, for practical purposes, are expected, and usually do, have a general aura of authority and believability on a jury.

Also, in *Linden*, the cumulative curative effect of the court's instructions and statements of defense counsel were not present as they are here.

Finally, the defendants also object to the following set of remarks by the Government in its closing argument to the jury:

> The fourth factor that suggest that, indeed, these defendants did not honestly believe that what they were doing was proper is that each of them at some point in time did not come forward and candidly and truthfully tell authorities what had occurred. You know, after the fact, when we get into courtrooms, there is often a gloss put over earlier activities: "Yes, we cooperated with the authorities," and, "Yes, we came forward and said we honestly believed that you could register where you didn't live."
>
> That's not what occurred in this case.

N.T. 7-16.

As has been previously discussed, the above type of remarks are not violative of *Doyle v. Ohio*, 426 U.S. 610 (1976), because they are a permissible comment on the

failure of the defendants to tell the "whole truth" or remain silent to the various authorities *prior* to indictment or arrest. Therefore, *Doyle* is not applicable because it only concerned the failure to talk to authorities *after* arrest or indictment.

In conclusion, and for all of the above reasons, the Court finds that the rule of *Griffin* was not violated by either the "stonewalling" and "come clean" language in the Government's rebuttal, or by the "uncontradicted" language in its closing argument.

II. Jurisdictional Application of 42 U.S.C. §1973i(c) to 1975 False Voting Registrations

The next assertion raised by the defendants is that any false voter registration occurring in 1975 is not within the jurisdiction of 42 U.S.C. §1973i(c) of the Voting Rights Act of 1965, 42 U.S.C. §1971 *et seq.*, because there was not a federal election in that year. The defendants rely upon the following jurisdictional language found in §1973i(c):

> Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however*, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the

> Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

42 U.S.C. §1973i(c) (emphasis supplied).

Defendants contend that only those people who registered to vote in 1976 would be subject to §1973i(c) because there was a federal election in that year. The Court must note at this juncture that a party who claims the benefit of a statutory exception has the burden of proving that his particular claim falls within that statutory exception. *U.S. v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967). *See also* 2A Sutherland, *Statutory Construction*, §47.11 (4th ed. 1973).

In order to determine the intent and meaning of §1973i(c) and the proviso thereto, it is first necessary to briefly review the congressional history of that section. The original Senate version of the Voting Rights Act of 1965, designated Senate Bill No. 1564, did not contain the current §1973i(c). That section was proposed by Senator Williams on April 13, 1965, after the bill left the Senate Judiciary Committee and was being debated on the floor of the Senate. 111 CONG.REC. 7890 (1965). However, at the time of its introduction, the Williams amendment did not contain the jurisdictional qualifying language at issue here. That language was later proposed by Senator Ervin and eventually made part of the Williams amendment by a vote of the Senate on April 29, 1965. 111 CONG.REC. 8988 (1965).

At the time of the amendment's introduction, Senator Williams made several statements as to the purposes behind the amendment:

> I have always been in favor of guaranteeing to every American citizen an equal opportunity to participate in the election process, but I feel just as strongly that this guarantee is meaningless if that vote is not counted properly, or if that vote is effectively canceled by a vote that is illegally cast, or if another person illegally registers to vote. I feel that

> the Congress, in its efforts to see to it that the integrity of a man's right to vote is protected, is obligated to see to it that the integrity of his vote itself is protected.

111 CONG.REC. 8423 (1965).

Senator Miller, a co-sponsor of the amendment, also made the following remarks about the purposes of the amendment:

> We believe that section 14(d) of the pending voting rights bill is deficient. First it limits its coverage to registration and voting under this act. There is no reason for limiting such coverage. Registration under this act or under any other act should be covered. There should be no loopholes. We should have clean elections — period; not clean elections under one act and unclean elections under some other act. The bill prohibits fraudulent registration. This is more difficult to prosecute than false registration, which is what our amendment prohibits. What cancels out the registration of an honest citizen is a false registration — fraudulent or otherwise. . . .

111 CONG.REC. 8813 (1965).

After considerable debate, Senator Ervin proposed the "provided" language. Of particular interest to this legislative analysis were the remarks of Senator Ellender, who engaged in the following dialogue with Senator Williams over the jurisdictional reach of the amendment:

> Mr. ELLENDER. In other words, the amendment of the Senator from Delaware would apply to all elections in all States?
>
> Mr. WILLIAMS of Delaware. In all States and in all elections, it would be ridiculous to say that the Senate would condone payment to a man to vote once but would not condone it if he votes twice or

that votes can be bought in one State and not in another.

Mr. ELLENDER. What is the Senator's justification for making it apply to a purely local election, say for mayor, for a representative in a legislature, for sheriff, or for any other local office?

Mr. WILLIAMS of Delaware. Solely because the bill itself so reads. The legislative counsel tried to draft this amendment to comply with other language of the bill. If a man is going to register and vote he should do so legally. In the amendment we are not dealing with the question as to whether the Federal Government should or should not have the right to intercede in a local election. The pending bill if it should be enacted into law answers that question. To provide otherwise the inference would be drawn that we were willing to have a fraudulent election at the local level, which is certainly not the intention. I believe that in any kind of election a man has a right to know that his vote after being cast properly will be counted properly. I see no objection to it being all-inclusive, and it was made all-inclusive.

Mr. ELLENDER. If the bill is enacted into law as presently written, and the amendment of the Senator from Delaware [Mr. Williams] is adopted, is it not a fact that the Senator's amendment would touch upon all elections, even one selecting a justice of the peace in a State?

Mr. WILLIAMS of Delaware. Yes, the Senator is correct, and so would the committee bill. It would follow the same pattern of the bill.

Mr. ELLENDER. If the bill is adopted along with the Senator's amendment, it would mean that in every election which would be held in a State, a township, or in a ward, the law would become effective?

> Mr. WILLIAMS of Delaware. That is true. That is also true with the bill itself, assuming that it is adopted as otherwise written.

111 CONG.REC. 8424 (1965).

In the same vein were the following remarks of Senator Hart:

> Mr. President, [the bill] . . . applies to State and local elections, as well as to Federal elections. That question, whether Congress has the power to insure fair election procedures in State and local elections, unless they are related to insuring the guarantees under the 14th and 15th amendments, is a very open one and a very serious one. This is the second reason which persuades us to hope that the amendment will not be agreed to.
>
> * * *
>
> . . . [W]e do not attempt to reach State or local elections with a criminal sanction on payment for fraudulent registration in voting. Why? Because we had very grave doubt that on that basis we could. It is that point to which I reply. It is not a piece of redtape or flimflam. It is a very serious problem.

111 CONG.REC. 8431, 8433 (1965).

It is apparent that Senator Ervin proposed the jurisdictional addition to the Williams amendment to alleviate these concerns. At that time, Senator Ervin made the following remarks:

> Mr. President, let me state briefly the reason why I offer my amendment to the pending amendment of the Senator from Delaware.
>
> I am in favor of amendment No. 82. However, in my opinion amendment No. 82 in its present form is unconstitutional because it is not restricted to Federal elections. By the term "Federal elections", I mean elections in which presidential elec-

> tors and Members of the U.S. Senate and Members of the U.S. House of Representatives are chosen.
>
> The only effect of my amendment would be to confine the application of amendment No. 82 to Federal elections and thereby make it constitutional under the interpretation placed on the 15th amendment by the Supreme Court of the United States in a number of cases.

111 CONG.REC. 8975 (1965).

After the Senate's passage of the revised amendment, it was proposed on the floor of the House of Representatives during the debate on the House version of the present Voting Rights Act of 1965. The House amendment was proposed by Representative Cramer on July 8, 1965. Representative Cramer made the following comments concerning the jurisdictional implications of the amendment:

> There is no question about the constitutionality of the proviso which was adopted on the Senate floor and which I included in my amendment, making this applicable to Federal elections.
>
> * * *
>
> So there would be no question of constitutionality I accepted the Senate amendment, and offered it in amended form before the Judiciary Committee. But, lo and behold, all these people who want to do so much about voting showed pretty clearly they want to do it when it relates to somebody else's back yard, but when it gets to their own they take the attitude "we had better be reserved about Federal powers." That is what happened, that is the story. The committee turned down the Williams-Cramer clean elections amendments 19 to 15.

111 CONG.REC. 15982 (1965).

At the same time, Representative Cramer made the following statements concerning the purposes and intent underlying the amendment:

Mr. CRAMER. Therefore, this section 12(e) is not limited to individuals registered by an examiner. So they contrived a broad remedy where any person is not entitled to vote but lo and behold, they would not give a person a remedy under my amendment if he falsely votes or falsely makes an application and lies to a registrar other than an examiner — no remedy. Outside of the places where the examiners are appointed, there is no remedy relating to lying to a registrar but there is under my amendment. And, therefore, I also say that there is nothing at all in the bill with regard to vote buying. So now if we want to do something all over America relating to everybody and not limited only to certain things and certain areas, you will vote for my amendment. You are going to have the opportunity to do so in the substitute offered, the McCulloch-Ford substitute. So I say for these two basic reasons, if for no others, the Celler committee bill should be substituted for the McCulloch bill. I want the citizens in all States to be first class citizens and not second class citizens. I want them to have the same rights as everybody else and not be discriminated against as it is under the Celler committee bill and under section 3, the pocket trigger.

111 CONG.REC. 15983 (1965).

So if you want clean elections in America, if you want to clean up the elections throughout this country, support this amendment. It will apply universally to the entire Nation. If you want those people who will be registered, as minorities, to have their votes mean something, then you will support this amendment, because you will not want their votes "watered down" by the stealing of other votes.

You can register all of the minorities you want, but if you turn around and permit other people to

> come in and register tombstones, to come in and provide false and fallacious and illegal absentee ballots, to come in and buy and procure votes, to come in to float voters from one voting precinct to another or from one county to another county — who do so intentionally, knowingly, willfully and purposefully to affect an election result — then you will just not give much of a remedy to these people to whom we are attempting to give voting rights today
>
> This applies to everybody. This provides for relief for everyone as it relates to preventing fraudulent voting.

111 CONG.REC. 16246 (1965).

The amendment was passed without revision by the House on the day after its introduction. 111 CONG.REC. 16281 (1965). The Williams-Cramer amendment was included without significant alteration by the Joint Conference Committee.

Therefore, the only interpretive evidence regarding the intent and meaning of the jurisdictional qualifying language at issue here are the statements made on the Senate floor by Senators Williams, Ellender, Hart and Ervin.

Under Pennsylvania law, registration to vote automatically qualifies the registrant to vote in any election for a two-year period, unless there is a change of address. 25 Pa.C.S.A. §623-21; 25 Pa.C.S.A. §623-40. If the registrant has voted in any election during that two-year period, the registration remains intact. If (s)he has not voted during that period, the registration lapses and there must be a re-registration. 25 Pa.C.S.A. §623-40. Furthermore, a single registration entitles the registrant to vote in local, state and federal elections without the need for separate registrations for each election. 25 Pa.C.S.A. §623-21; 25 Pa.C.S.A. §623-2; 25 Pa.C.S.A. §623-38.

With these state registration laws in mind, the Court must apply the proviso in §1973i(c) to the instant facts, in light of the legislative goals. Two approaches will be taken.

From a literal viewpoint, the "provided" language only applies to "federal *elections*." That provision does not include a reference to "*registration*," even though the preceding general language of §1973i(c) prohibits the use of false information for purposes of *registration, voting* or *conspiracy* to falsely register or illegally vote. In essence, the section prohibits three separate and distinct types of criminal behavior. A person can register legally using truthful information but vote illegally in an improper election district. Alternatively, a person can illegally register using false information but never vote at all. Therefore, interpreting the phrase "federal elections" in light of the three-part thrust of the statute, the Court finds the phrase does not include registration activities.

This literal reading of the qualifying language of §1973i(c) comports with the prior legislative concerns expressed by Senators Ellender, Hart and Ervin during the floor debate — namely, that the amendment should not apply to purely state or local "elections" for mayor, state representative or justice of the peace. 111 CONG.REC. 8424, 8431, 8433, 8975 (1965). A concern for federal interference with *registrations* was not articulated. Therefore, under §1973i(c), any purely state or local election occurring in 1975 in which persons illegally *voted* using false information would not be within the jurisdicitonal reach of §1973i(c) because there was not a federal election in 1975.

Furthermore, an extrinsic approach to the qualifying language of the "provided" clause brings us to the conclusion that false registration alone can be a violation of the statute even in respect to registrations occurring in years where there is no federal election — such as 1975. Under state election law, a registrant does not register for an election but rather secures a period of eligi-

bility to vote in *any* election during that period.[30] In Pennsylvania, this is for a two-year period. Congress was aware of this pattern of eligibility when it enacted §1973i(c).[31] Accordingly, any false registration can be the basis of a violation of §1973i(c), because it creates an *eligibility* to vote in a federal election. This is true whether or not that registration occurs in the same year as a federal election. The construction urged by the defendants would be in derogation of the manifest congressional intent. If the defendants are correct, a person intending to vote in a federal election by means of a false registration need only wait until the "off year" to commit the false registration and then cast a vote in the following year. This result would undermine the congressional purpose under §1973i(c) of providing a statute with "extraordinary scope and sweep" with which to stop illegal voting practices. This goal was to be achieved under the statute by prohibiting the actual casting of the illegal vote and to further prohibit registration using false information.[32] Congress determined that the evil of false reg-

30. Whether Congress could establish by law a separate federal registration is unclear under its legislative powers under Article 1, section 4 of the United States Constitution. However, until the time that a separate federal registration is enacted, a system of general registration qualifying the registrant to vote in local, state and federal elections exists.

31. Representative Edwards made the following acknowledgement during the House debate over the Cramer amendment:

> In the first article of the Constitution which authorizes the individual States to decide the qualifications of voters in both Federal and State elections, subject only to the condition that whoever is deemed qualified to vote for "the most numerous branch of the State legislature" is automatically qualified to vote in Federal elections.
>
> The giving to the States of this responsibility was no casual decision. It has been reaffirmed again and again. . . .

111 CONG.REC. 16012 (1965).

32. *See* statements of Senator Williams during Senate debate on his amendment, 111 CONG.REC. 8428 (1965), and statements of Senator Dirksen concerning the testimony of Senator Williams on his amendment at Hearings before Senate Judiciary Committee on S.1564, 89th Cong., 1st Sess., April 5, 1965, at 803.

istration is just as great as the evil of illegal voting — both present an equally grave threat to the integrity and honesty of the electoral system of the Nation.[33]

The major weakness with the defendants' analysis is that they are misconstruing the statute by adding into the statute the concept of an election "year," when the statute clearly says nothing about an election "year." Instead, it speaks of the act of "registration" and the act of "voting."

In the instant action, the persons who registered in 1975 using false addresses and false periods of residence became eligible, by that single 1975 act, to vote in the federal election in 1976.[34] The statute was aimed at prohibiting the exact type of activities that occurred in this case, as indicated by the following statements of Senator Williams during the Senate debate:

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33. Senator Williams stated during the Senate debate on his amendment:

> I do not wish any misunderstanding about what we are trying to achieve. We are trying to deal with two subjects — false registration and payments for registration and voting. First, we want to make sure that a person in registering does not knowingly or willfully give false information; second, we wish to make sure that anyone who pays or offers to pay a person or anyone who accepts payment for casting his vote or for registering would be in violation of the law. But beyond that, we do not intend to touch any of the other activities the Senator described.

111 CONG.REC. 8987 (1965). *See also* 111 CONG.REC. 8425, 8429, 8432, 8988 (1965) (Senator Williams); 111 CONG.REC. 15983, 16246 (1965) (Representative Cramer), quoted *supra*.

34. The following individuals falsely registered in 1975 using addresses at which they did not live, and voted in the following year, as indicated by City of Philadelphia Voter's Permanent Registration Affidavits, in the 1976 primary or general elections at which federal candidates were on the ballot: Patricia DiGiambattista (defendant); Joseph Tully (defendant); Maryann Tully (defendant); Catherine Spagna (defendant); Vincent Spagna (defendant); Sheldon Keslinger (Government immunized witness); Joan Donaldson (Government immunized witness).

Mr. SALTONSTALL. My question is a simple one. Do I understand the Senator's amendment to mean that if, for instance — as I have known it to happen — 20 people were registered in a house where there are only a few beds, and the question would arise of registration of a questionable character, could those persons be prosecuted under the Senator's amendment?

Mr. WILLIAMS of Delaware. The man who knowingly and wilfully falsely registers would be subject to prosecution.

Mr. ELLENDER. You mean more people might be registered at an address on X Street than actually live there?

Mr. WILLIAMS of Delaware. Yes, if 20 people registered at the same address on X Street, and it could be proved they did not live there, they could be prosecuted. If only 5 eligible persons lived at that address and 25 others had fraudulently registered, under my amendment those 25 persons who had fraudulently registered as living at that address would be considered as having registered illegally and could be subject to prosecution.

Likewise, if in the general election they voted as the result of this fraudulent registration, under my amendment they could be prosecuted. The person himself could be prosecuted under the amendment because he had given false information in registering.

By the same token, if a ward leader or someone else conspired with this person he too could be prosecuted. If there is a conspiracy between those illegally registering and a second party they can both be held responsible. Why should there not be some responsibility on the part of the man registering?

I support the section of the civil rights bill which was enacted last year which guaranteed our citizens the right to vote. I thought then we had

dealt with the problem, but apparently we did not do it adequately. I am willing to guarantee that every man and woman shall have the right to vote, but if he does not wish to vote without being paid he should not be eligible to vote.

By the same token, when we guarantee that man the right to register he should have some responsibility that when he goes before the registrar he is giving the registrar the proper information and is not registering in a State or a district in which he does not qualify to vote.

111 CONG.REC. 8425 (1965) (emphasis supplied).

Therefore, based on both a literal and extrinsic approach to the meaning and intent behind §1973i(c), the Court finds that the statute was intended to include false *registrations* occurring in federal and non-federal election years and was intended to include only illegal *voting* activities using false information in federal elections.

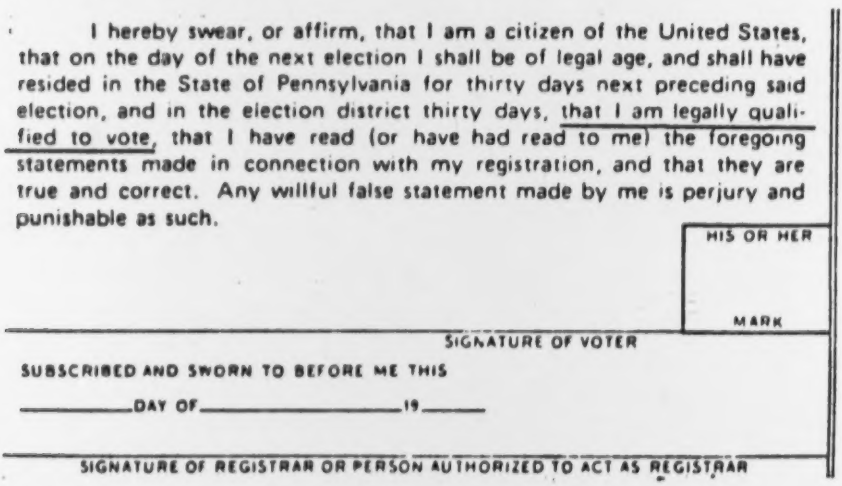
III. 1975 Registration Form and Residence Under Pennsylvania Election Law

Defendants argue that the indictment fails to allege sufficient facts to constitute a federal criminal offense because the 1975 voter registration form only specifies "No. - Street - House, Floor, Apt. or Room" without further explanation and is, therefore, vague and misleading. As a result, the defendants could not have misrepresented any material facts in completing the 1975 registration form, and could not have violated §1973i(c). The Court finds their arguments to be without merit for two reasons. First, the 1975 Pennsylvania voter registration form is neither vague nor misleading and, accordingly, there can be a "knowing and willful" misrepresentation as to a material fact on that form under §1973i(c).

To determine if the question on the 1975 form requesting the registrant's "No. - Street - House, Floor,

Apt. or Room" is vague or misleading, the entire form must be examined to determine what a reasonable person would perceive that question to mean. See *Bronston v. U.S.*, 409 U.S. 352, 355-356 n.3 (1973). As the form shows,[35] two other questions asked of a registrant pertain to the registrant's "address" and a reading of all three questions in conjunction can only lead to the conclusion that the form was asking for the person's address or residence, as those terms are used by the most elementary person in every walk of life in contemporary America.

The form also contains an attestation clause, reproduced as follows:



I hereby swear, or affirm, that I am a citizen of the United States, that on the day of the next election I shall be of legal age, and shall have resided in the State of Pennsylvania for thirty days next preceding said election, and in the election district thirty days, that I am legally qualified to vote, that I have read (or have had read to me) the foregoing statements made in connection with my registration, and that they are true and correct. Any willful false statement made by me is perjury and punishable as such.

HIS OR HER MARK

SIGNATURE OF VOTER

SUBSCRIBED AND SWORN TO BEFORE ME THIS

_____DAY OF_____19_____

SIGNATURE OF REGISTRAR OR PERSON AUTHORIZED TO ACT AS REGISTRAR

(Actual size.) (Emphasis supplied).

By this clause, the registrant swears or affirms under oath to the truthfulness of the information in the presence of an official from the Philadelphia Voter Registration Division. In addition, it appears directly above the signature line and is not obscured in any way. *See U.S. v. Squires*, 440 F.2d 859, 865-866 (2d Cir. 1971) (Moore, J., concurring). Part of this attestation clause states that the signatory swears to be a "legally qualified

35. *See* the complete text of the 1975 Pennsylvania Voter Registration Form at Appendix, *infra*.

voter," which, in turn, means that: (1) the person is legally registered to vote under Pennsylvania election law; and, (2) the person has registered using a valid legal residence as defined under state law. These provisions of law are based on Pennsylvania statutory and decisional law. The statute provides:

> In determining the residence of a person desiring to register to vote, the following rules shall be followed so far as they may be applicable:
>
> (a) That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.
>
> (b) A person shall not be considered to have lost his residence who leaves his home and goes into another state or another election district of this State for temporary purposes only, with the intention of returning.
>
> (c) A person shall not be considered to have gained a residence in any election district of this State into which he comes for temporary purposes only, without the intention of making such election district his permanent place of abode.
>
> (d) The place where the family of a married man or woman resides shall be considered and held to be his or her place of residence, except where the husband and wife have actually separated and live apart, in which case the place where he or she has resided for two months or more shall be considered and held to be his or her place of residence.
>
> (e) If a person removes to another state with the intention of making such state his permanent residence, he shall be considered to have lost his residence in this State.
>
> (f) If a person removes to another state with the intention of remaining there an indefinite time and making such state his place of residence, he shall be

considered to have lost his residence in this State, notwithstanding he may entertain an intention to return at some indefinite future period.

(g) If a person removes to the District of Columbia or other Federal territory or foreign country to engage in the government service, he shall not be considered to have lost his residence in this State during the period of such service, and the place where the person resided at the time of his removal shall be considered and held to be his place of residence.

(h) If a person goes into another state and while there exercises the right of a citizen by voting, he shall be considered to have lost his residence in this State.

25 Pa.C.S.A. §2814.

Pennsylvania cases have established certain legal principles that are to be applied in addressing a question of residence under this statute. Perhaps the landmark decision in this area was by the Pennsylvania Supreme Court in *Stabile Registration Case,* 348 Pa. 587 (1944), which held, in relevant part:

> The *fact* of any person's residence, for any legal purpose, whether for voting, or for holding office, or for taxation, has never been determined merely by that person's "say so". In determining that question the state brushes aside all colorable pretences and finds the reality behind the guise.
>
> * * *
>
> . . . In Fry's Election Case, 71 Pa. 302 . . ., this court quoted with approval from Story's Conflict of Laws, sec. 41, as follows: "By the term 'domicil' in its ordinary acceptation, is meant the place where a person lives or has his home. In a strict legal sense that is properly a domicil of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has

the intention of returning." Justice Agnew added: "The term residence [as used in the Constitution] means the place where the elector makes his permanent and true home, his principal place of business, and *his family residence,* if he have one" (italics supplied).

* * *

. . . When Stabile and his wife come to *that* home they come as they would come to a lodging house where they have the right to sleep and to eat and to entertain friends. It is not their permanent home, their place of domestic abode. It is a place where they are only transients, exactly as they would be at a hotel where they had similar privileges.

* * *

. . . If by merely obtaining the privilege of occasionally lodging and eating and entertaining in another man's habitation, a person can obtain "legal residence" there, our decision in the Dorrance case, supra, and the decision of the U.S. Supreme Court in the Green case (State of Texas v. State of Florida), supra, must be erroneous. We do not so consider them.

* * *

Residence indicates permanency of abode as distinct from mere lodging and boarding.

348 Pa. at 591, 593-594.

In the case before us, the Court duly instructed the jury on the above-settled principles of Pennsylvania voter registration law concerning "residence." [N.T. 8-64 to 67.] The Court also instructed the jury that persons registering to vote are presumed to know state election law concerning registration. [N.T. 8-65 to 71, 85, 86.] That instruction was given based on the evidence presented at trial as a conclusion of law, for the following reasons.

When a person swears under oath that (s)he is a "legally qualified voter," (s)he is affirming that (s)he has

registered using a valid, legal residence for purposes of that registration. This presumption does not run afoul of the legal doctrine that, "Ignorance . . . as to a matter of law is a defense if . . . the ignorance negatives [sic] the . . . knowledge . . . required to establish a natural element of the offense . . . *U.S. v. Squires, supra,* 440 F.2d at 864, Model Penal Code §2.04(1)(a) (A.L.I. Prop. Official Draft, 1962). As the Court instructed the jury, this means that, if a person acts inadvertently, accidentally or by good faith mistake, (s)he is not acting "knowingly or willfully" in giving false information as to their residence for purposes of establishing eligibility to register to vote, as required under §1973i(c).[36] However, this defense is not without limitation. A person cannot act in bad faith by deliberately ignoring what is obvious[37] or close his eyes to facts that are true to a high probability. *See Leary v. U.S.*, 395 U.S. 6, 46 n.93 (1969); *U.S. v Jewell*, 532 F.2d 697, 700 (9th Cir. 1976); *U.S. v.*

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36. As Senator Tydings, a member of the Senate Judiciary Committee, stated during debate on the floor of the Senate as to the general meaning of the phrase "knowingly and willfully," used throughout the Voting Rights Act of 1965, 42 U.S.C. §1971 *et seq.*:

> Subsection 12(a) provides for the imposition of criminal penalties for "willfully and knowingly" depriving or attempting to deprive other persons of rights secured by certain enumerated sections of the act or for "willfully and knowingly" violating section 11. The phrase "willfully and knowingly" was inserted by the Judiciary Committee to make it clear that no criminal violation is involved where a person acts with due care and without knowledge of the relevant facts. To put it another way, action or inaction which deprives others of rights secured by the act but which is done or omitted inadvertently is not a basis for prosecution. This language was not intended to require a showing of any specific intent similar, for example, to that presently required under judicial constructions of 18 U.S.C. 242. The same language was inserted by the committee in section 12(c) for the same reason.

111 CONG.REC. at 8369 (1965).

37. Defendants agree with this doctrine, as indicated in their Verbatum [*sic*] Jury Instruction as Proposed by Defendants Joseph R. Ricca, Ramon Meirino and Anthony Fiorentino, at 2.

Squires, supra, 440 F.2d at 863. A person cannot deliberately fail to read or attempt to understand clear language to which (s)he is swearing under oath. *See U.S. v. Jewell, supra,* 532 F.2d at 702-703. Therefore, the Court concluded that, if a person attests that (s)he satisfies certain legal requirements under state election law, that person cannot be excused on the ground that (s)he did not understand the law (s)he attested to have knowledge of. As the court in *Ketchum v. Ward*, 422 F.Supp. 934 (W.D.N.Y. 1976), held:

> Fundamental fairness no doubt requires that an individual be given the opportunity to discover a statute's existence, applicability and meaning. Not every layman will read the Penal Code from cover to cover. But, if the statute in question is either clear in meaning upon reading, or sufficient to warn the layman that he should seek legal advice as to its applicability and meaning, it is proper to charge the potential violator with such knowledge of a law's applicability as he could obtain through competent legal advice . . . If a competent lawyer is consulted, he should be able to predict whether the statute might be used as a basis for prosecuting his client. If the words of the statute and other related law make it impossible to make such a prediction, a statute comes close to inadequate advance notice . . .

422 F.Supp. at 941.

A person does not have to know with certainty that these laws exist or that a particular statute or decisional authority is applicable. A person need only be aware with a high probability of certainty that some illegality exists. *Leary v. U.S.*, 395 U.S. 6, 46 n.93 (1969). Furthermore, if a person chooses to swear that an act is legal when (s)he is uncertain that it is in fact legal, the choice carries with it the duty of investigating the law. In the present case, there is a high probability that a registrant would be aware that the phrase "legally qualified to vote"

might have a particular legal meaning, separate and distinct from the meaning those words might convey in casual conversation.[38] This is reinforced by the statement on the form that a penalty will be incurred for false swearing. Although there is a strong public policy supporting the mistake-of-law doctrine and the requirement that a person present a compelling justification to overcome it, *U.S. v. Barker*, 546 F.2d 940, 948 n.23 (D.C.Cir. 1976), there are obvious and necessary exceptions to it. Such an exception is articulated in *U.S. v. Barker, supra,* at 952-954. There, the court relied upon the Model Penal Code, §2.04(3)(b), which states:

> A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: . . . (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

In this case, the defendants presented no such defense. *Mauney v. U.S.*, 388 F.Supp. 1078, 1079 (E.D.Tenn. 1971). The defendants did try to introduce the testimony of a solicitor to the Election Commission for the obstensible purpose of orally discussing what constituted his opinion of local law concerning residence. The Court refused the offer because defendants were unable to show that: (1) they had relied upon these opinions or, (2) that these opiniions were premised on some form of written or reported rulings of the Commission. [N.T. 6-

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38. The 1976 mail-in voter registration form also involved in the present action similarly contains the same attestation clause that appears on the 1975 form.

189 to 194.] Also, an exception applies if the applicable law is vague or unclear because, then, a person's conduct can only be based on guesswork or uncertainty.

As the Supreme Court, in *Connally v. General Construction Co.*, 269 U.S. 385 (1926), held:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essentials of due process of law . . . [T]he decisions of the court upholding statutes as sufficiently certain [in other cases], rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ.

269 U.S. at 391, *quoted in Ketchum v. Ward*, *supra*, 422 F.Supp. at 940 (citations omitted).

This exception was evidenced in the case of *U.S. v. Squires*, *supra*, where a firearms purchase form required the purchaser to state whether (s)he had been a convicted felon under certain specified federal statutes. The *Squires* court held that:

> [W]e do believe that when the Government adopted the form it imposed upon itself an unusually difficult burden of proof as to a signer's knowledge of his criminality. It can safely be said that many lawyers would not have understood, without the benefit of research, the import in the original form of the certification provision. To require a layman, without any explanation, to sign such a certification at his peril appears to us to be quite unrealistic. While it is possible that a defendant may be shown to have sufficient familiarity with the cited statutes, all that we

> are saying here is that the obscure language of the certification provision was highly relevant to [the defendant's] knowledge, and that the trial court should have so instructed the jury.

440 F.2d at 865.

A parallel decision on this notion is *U.S. v. Bishop*, 412 U.S. 346 (1973), which discussed the requirement that the defendant be shown to have "willfully" submitted a false tax return. The Court stated:

> This longstanding interpretation of the purpose of the recurring word "willfully" promotes coherence in the group of tax crimes. In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. The Court has said, "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *Spies*, 317 U.S., at 496. Degrees of negligence give rise in the tax system to civil penalties. The requirement of an offense committed "willfully" is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court. The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

412 U.S. at 360-361 (citations omitted).

The law is clear that a person must be legally registered in order to vote. 25 Pa.C.S.A. §2811. It is also clear that a person must have some factual connection or nexus with the address from which (s)he registers to vote. 25 Pa.C.S.A. §2814. One basic principle particularly pertinent here is that a person cannot register from a residence with which (s)he has no nexus whatsoever. For example, defendant Fiorentino registered from 1433

South 6th Street, 3rd floor, using the 1975 voter registration form. However, before trial, he admitted to the federal grand jury that he had *never* lived at that address. [N.T. 4-217.] Therefore, the jury found under Pennsylvania law that defendant Fiorentino could not claim he was a resident of an address at which he had no factual nexus whatsoever. He attested, as did all registrants, on the 1975 registration form that he was "legally qualified to vote," thus, in effect swearing that, under Pennsylvania law, the registration was legally proper. Therefore, the jury was unquestionably entitled to find that defendant Fiorentino did not act inadvertently, by mistake or accident or by mistake of law, but acted "knowingly or willfully" in providing a false address with which to register to vote.

Defendant Ricca also completed a 1975 voter registration form and attested that he, too, was "legally qualified to vote" at 1427 South 6th Street on the 2nd floor. He told the federal grand jury that he had "stayed there a few times, but that's not my permanent address." [N.T. 2-183.] He also told the FBI that "he stayed there on a couple of occasions in both 1974 and 1975 as a result of marital problems . . . never intend[ed] to abandon his residence." [N.T. 5-31] There was no evidence to corroborate Ricca's claim that he was having marital problems or that he was separated from his wife. *See* 25 Pa.C.S.A. §2814. The testimony of several witnesses at trial indicated that Ricca had frequented the first floor apartment of defendant Cianciulli.[39] Ricca's counsel argued in her closing argument to the jury that Ricca did, in fact, live in the first floor apartment with defendant Cianciulli based on the above testimony and Ricca's prior statements. [N.T. 7-63 to 66.] However, Ricca's registration form indicated that he lived on the second

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39. *See* testimony of the following witnesses: Anthony Lucidino and Dr. Leopold Salkind, who testified on September 20, 1979, as indicated in the Court's bench notes and the Court Reporter's official notes; Salvatore Cannistraci, N.T. 1-165, 166, 177.

floor and not the first floor of that building. The Pennsylvania registration law provides, and the jury was so instructed, that staying at an address infrequently, or simply stating that you reside at an address, is not sufficient to establish residence. *See Stabile Registration Case, supra,* 348 Pa. at 591, 593-594; 25 Pa.C.S.A. §2814. Based on these facts and the appplicable law, the Court finds the jury had a clear basis to find that Ricca acted in deliberate disregard of state law on residence and did not act by mistake, accident or inadvertence and did so "knowingly or willfully."

In conclusion, the defendants' claim on these grounds lacks merit.

IV. Jury-Tampering Incident

Finally, defendants Ricca and Fiorentino claim that they were deprived of a full, fair and public trial because the jurors were prejudiced by a possible jury-tampering incident. The Court rejects the defendants' contentions for several reasons.

The factual background surrounding this incident is as follows: On Friday, September 14, 1979, which was the second full day of the trial, alternate juror Joan Olejkowsky was approached by an unidentified male at the elevators outside the courtroom after the Court had recessed for the day. The male asked her where she lived and whether he could give her a ride home. She declined the offer and left the courthouse. On Monday, September 17, 1979, juror Olejkowsky told other jurors of the incident and asked them whether she should report the incident to the Court. Some of the jurors said that she should notify the Court, which she did that day by informing the courtroom deputy clerk of the incident, who, in turn, notified the trial judge. The Court instructed the clerk to tell the juror, out of the presence of the other jurors, to immediately advise the clerk if she

noticed the male in the courtroom. She did not see the male in the courtroom that day, but did see him the following day, September 18, and so notified the clerk. Pursuant to the Court's instruction, the male was questioned by agents of the FBI. The person identified himself to the FBI as the brother of defendant Fiorentino. When this information was reported to the Court, the trial was recessed and the Court notified the defendants and their counsel of the incident. [N.T. 5-83.] Thereafter, the Court undertook an individual *voir dire* of the juror involved, as well as a separate *voir dire* of all of the other jurors. This was done in the presence of the defendants and counsel and was on the record. The Court asked the juror involved whether she had talked to any other jurors about the incident and whether she had been prejudiced by the incident in any way. She said that she had only told the other jurors initially about the occurrence of the incident but had not talked about the case with them. She also stated, under oath, that she did not know the identity of the male who had approached her and that some of the other jurors had told her that they also had seen him. [N.T. 5-86 to 90, 5-100 to 102.] The other jurors were asked: (1) whether they knew about the incident involving juror Olejkowsky and whether she had told them about it or if they knew who the male was; (2) if they would be prejudiced in any way by the incident; and, (3) whether they could still render a fair and impartial verdict based solely on the evidence presented. All of the jurors testified, under oath, that they did not know who the male was; that they did not associate him with either the Government or the defense; and, that the incident would *not* affect their impartiality and fairness to decide the instant action. [N.T. 5-104 to 133, 6-3 to 12.] The Court ruled that the jury should be sequestered forthwith for the remainder of the trial. [N.T. 5-82.] None of the jurors were told then or at any time during the remainder of the trial why they had been sequestered and they were not ad-

vised of the identity of the male who had approached juror Olejkowsky.

Counsel for Ricca filed an affidavit on October 1, 1979, five days after the trial, and attached to Ricca's post-trial motion, advising the Court for the first time of another related matter. She says in her affidavit that, while the jury was deliberating, she was approached by a person in the courthouse corridor who identified himself as the boyfriend of juror Olejkowsky. He supposedly told her that juror Olejkowsky had told him of being approached by an unknown male and that he had advised her to notify the Court. The affidavit stated, "He also stated that Ms. Olejkowsky has served on juries before but 'never anything like this' and he added 'after this case she said she'll never vote again.' "[40] This incident was not reported to the Court when it occurred, and it was not brought to the Court's attention when the verdict was returned. The first time the Court was informed of the incident was in Ricca's post-trial motion.

Three separate questions emerge from this incident. First, was the jury, as a whole, prejudiced by the incident involving the outside contact with juror Olejkowsky to the extent that they were unable to return an impartial verdict based solely on the evidence and not on any outside influence? Second, does the incident involving the conversation between juror Olejkowsky's boyfriend and defense counsel constitute sufficient proof that juror Olejkowsky was adversely prejudiced by the communication with the brother of defendant Fiorentino? Third, did juror Olejkowsky violate the Court's instructions not to discuss the "case" with either the other jurors (until jury deliberations commenced) or with any third party during the course of the trial.

The classic test to be applied in cases of improper contact with a jury or juror was best stated by the United

40. Defendants Ricca and Fiorentino's Motion for Judgment of Acquittal, Motion for Arrest of Judgment and Motion for New Trial, affidavit of Helen T. M. McCaffrey, Esq., dated October 1, 1979.

States Supreme Court in *Remmer v. U.S.*, 347 U.S. 227 (1954):

> . . . [A]ny private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 229. *See also U.S. v. Allen*, 376 F.Supp. 1386, 1388 (E.D.Pa. 1974); *U.S. v. Marine*, 84 F.Supp. 785, 787 (D.Del. 1949); *U.S. v. Rakes*, 74 F.Supp. 645, 648 (E.D.Va. 1947).

The approach to be taken when deciding these questions is set forth in *U.S. v. Allen, supra:*

> [T]he Court must apprise the defendant of the fact of any private communication and must take evidence concerning the identity of those involved and the nature and extent of the communication. Normally the participants would be questioned as to the content of the communication, who was present and who overheard the communication. However, the approach taken by the trial judge in a given case is left to his discretion.

376 F.Supp. at 1389, *relying upon Morgan v. U.S.*, 399 F.2d 93, 96 (5th Cir. 1968); *see also U.S. v. Rakes, supra*, 74 F.Supp. at 648.

In the case at bar, this approach was followed, to the letter. The defendants were informed of the incident as soon as the outsider was identified so that a meaningful inquiry could be initiated. A full inquiry was conducted into all features of the incident and proper instructions

were thereafter given. [N.T. 5-104 to 133, 6-3 to 12.[41] The Court was fully satisfied then, and remains so, that there was no prejudice to any defendant because of the juror's contact.

Second, as to the incident outlined by Ricca's counsel, involving statements allegedly made by juror Olejkowsky to her boyfriend and later communicated to defense counsel, defendants request a new trial pursuant to Fed.R.Crim.P. 33, presumably on the ground of "newly discovered evidence." The statements of juror Olejkowsky, the defendants contend, support their contention that she was indeed prejudiced by the incident.

In considering this contention, assessments of materiality and due diligence should be considered. *See U.S. v. Brody,* 295 F.2d 157, 160 (D.C. Cir. 1961).

Newly discovered evidence would be material here if it tended to prove prejudice of the type that would have destroyed juror Olejkowsky's impartiality and fairness to decide the case. The Court finds that no such showing has been offered. The affidavit itself is equivocal and relates facts unconnected to any issue the jury was to decide. Moreover, it is consistent with the testimony of the juror taken in court under oath. [N.T. 5-86 to 90, 100 to 102.] *See U.S. v. Gottfried,* 165 F.2d 360, 365 (2d Cir. 1948).

If this episode is as material as counsel argue it is, it is crucial to note here that defense counsel, despite a duty and an opportunity to do so, failed to bring the matter to the Court's attention when it could have taken some further action. Even though the Court asked counsel twice in open court *before* the jury was discharged, whether they had "anything further,"[42] counsel stood si-

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41. Individual *voir dire* of jurors has been sanctioned as an appropriate manner of rebutting the presumption of prejudice stemming from a communication between a juror and a third party. *See U.S. v. Allen, supra,* 376 F.Supp. at 1388-1390.

42. Court's bench notes and Court Reporter's official notes. (September 24, 1979).

lent.[43] Such strategy, under whatever name, is nevertheless a conscious and informed choice and it has its advantages, as well as its shortcomings. For a pertinent example, *see, e.g., Green v. U.S.*, 256 F.2d 483, 484 (1st Cir. 1958) ("But Green cannot have it both ways. He cannot withhold the evidence, gambling on an acquittal without it, and then later, after the gamble fails present such withheld evidence in a subsequent proceeding. . . ."); *U.S. v. McGrady*, 191 F.2d 829, 831 (7th Cir. 1951) ("The record does not disclose that any remarks were in fact made in the presence of the jurors. It does, however, disclose that defendant knew of the incident just related before the trial had been concluded. But it was not called to the trial judge's attention, nor was he asked to rule in the matter before the jury returned to consider the verdict."); *U.S. v. Gottfried*, 165 F.2d 360, 365 (2d Cir. 1948); *U.S. v. Soblen*, 203 F.Supp. 542, 564-566 n.13-14 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir. 1962) ("Where the allegedly newly discovered evidence was known by the defense or readily obtainable by it before or during trial and the defense trial strategy was not to utilize such new or obtainable evidence during trial, the decision by the defense to change its strategy after an unfavorable verdict does not render the evidence 'newly discovered.' "). *See also U.S. v. Norman*, 402 F.2d 73, 78 (9th Cir. 1968).

On the issue of whether further investigation of the incident is warranted, the test, as applied by the Second Circuit Court of Appeals in *U.S. v. Krulewitch*, 167 F.2d 943 (2d Cir. 1948), is as follows:

> Upon such a weak showing the district judge was well within the exercise of his sound discretion in

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43. This Court has adopted as the standard of conduct the Code of Professional Responsibility, which states:

> A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

DR 7-108(g).

> denying the motion without further investigation as to the actual facts. It does not appear that any reason was given him to believe that further investigation would add evidence to support the motion and the credibility of the bailiff was so shaken by his repudiation of his first affidavit that the affidavit of the forelady was, and should have been, held sufficient to defeat the motion on the facts.

167 F.2d at 950.

Moreover, the Third Circuit Court of Appeals discussed post-trial jury *voir dire* in *U.S. ex rel. Daverse v. Hohn,* 198 F.2d 934 (3d Cir. 1952):

> But we wish to make plain that we join the court below in disapproving in general the practice of interviewing a juror after a trial as to his state of mind during the trial. There may conceivably be special circumstances which could justify such a course but we do not find them here. A full exercise of the right of *voir dire* examination ordinarily will afford a defendant ample opportunity to acertain the qualifications of a prospective juror and to determine whether he possesses bias and prejudice.

198 F.2d at 938-939. *See also U.S. v. Nystrom,* 116 F.Supp. 771, 777 (W.D.Pa. 1953).

Finally, the defendants claim that the conversations between juror Olejkowsky and the other jurors and her boyfriend were in direct violation of the Court's instructions that the "case" should not be discussed with the other jurors before the final deliberations or with third persons. [N.T. 1-19 to 21.]

There is no evidence that juror Olejkowsky discussed the "case" with anyone. As she stated during her individual *voir dire:*

> When I came in on Monday I said that, you know, I had been approached by someone, but I didn't talk anything to him other than saying no and

no, because we were instructed not to talk to anybody in case he could have any bearing on the case.

N.T. 5-89.

Therefore, the Court finds that its instructions were not violated by juror Olejkowsky.

V. Conclusion

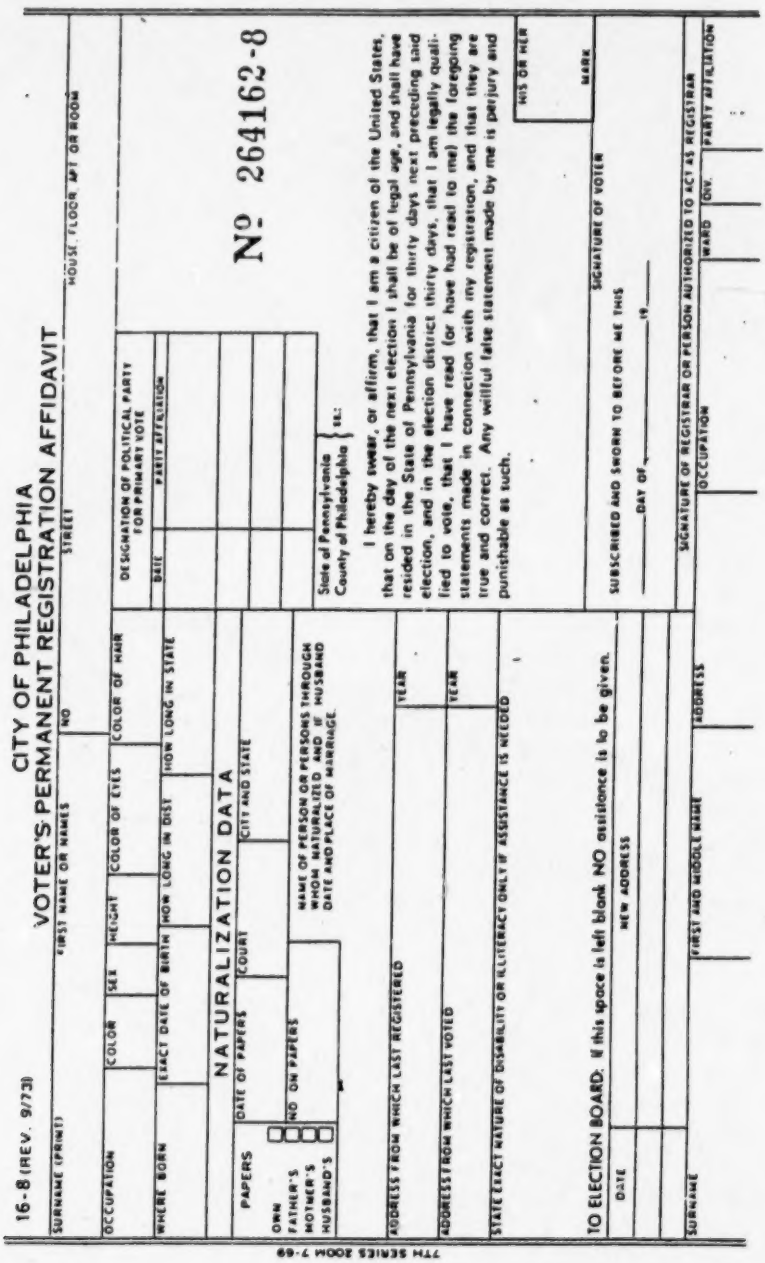
For all the above reasons, all of the defendants' post-trial motions for a new trial, judgment of acquittal and motion for arrest of judgment were denied by the Court's Order dated October 23, 1979. The foregoing Memorandum Opinion is in support of that Order.[44]

LOUIS C. BECHTLE, J.

44. The Court finds the following additional claims raised in defendants' post-trial motions to be totally without merit: (1) circumstantial evidence is admissible to prove state of mind of a defendant. Exculpatory statements made by the defendant when later proven to be false are "circumstantial evidence of guilty consciousness and have independent probative force." *U.S. v. Smolin,* 182 F.2d 782, 786 (2d Cir. 1950); however, whether the statements are false in fact, and the weight that should be attributed to them, are matters for the jury as the trier-of-fact. *Government of the Virgin Islands v. Lovell,* 378 F.2d 799, 806-807 (3d Cir. 1967). In the instant action, defendant Ricca claimed before the federal grand jury and FBI that he lived at the address from which he registered. As shown at trial, this statement was proven to be false in fact and in law; (2) the verdict was not contrary to the weight of the evidence, as indicated in the Court's previous discussion of the evidence presented; (3) the Court did not err in denying defendants' numerous motions for a mistrial; and, (4) the defendants' claims — that the Court failed to charge the jury as *per* the defendants' requested points for charge concerning intent and that the Government failed to prove an essential element of Count 36 of the indictment — are both phrased with no semblance of particularity and, therefore, are not presented in compliance with the requirements of Local Rule of Criminal Procedure 14 (E.D.Pa.).

APPENDIX

Following is a reproduced sample of the Voter's Permanent Registration Affidavit, in actual size:



16-8 (REV. 9/73)

CITY OF PHILADELPHIA

VOTER'S PERMANENT REGISTRATION AFFIDAVIT

No 264162-8

SURNAME (PRINT) | FIRST NAME OR NAMES | NO | STREET | HOUSE, FLOOR, APT OR ROOM

OCCUPATION | COLOR | SEX | HEIGHT | COLOR OF EYES | COLOR OF HAIR | DESIGNATION OF POLITICAL PARTY FOR PRIMARY VOTE (BASE | PARTY AFFILIATION)

WHERE BORN | EXACT DATE OF BIRTH | HOW LONG IN DIST | HOW LONG IN STATE

NATURALIZATION DATA

PAPERS | DATE OF PAPERS | COURT | CITY AND STATE

OWN | FATHER'S | MOTHER'S | HUSBAND'S | NO. ON PAPERS | NAME OF PERSON OR PERSONS THROUGH WHOM NATURALIZED AND IF HUSBAND DATE AND PLACE OF MARRIAGE

ADDRESS FROM WHICH LAST REGISTERED | YEAR

ADDRESS FROM WHICH LAST VOTED | YEAR

STATE EXACT NATURE OF DISABILITY OR ILLITERACY ONLY IF ASSISTANCE IS NEEDED

TO ELECTION BOARD: If this space is left blank NO assistance is to be given.

DATE | NEW ADDRESS

SURNAME | FIRST AND MIDDLE NAME | ADDRESS

State of Pennsylvania
County of Philadelphia } ss:

I hereby swear, or affirm, that I am a citizen of the United States, that on the day of the next election I shall be of legal age, and shall have resided in the State of Pennsylvania for thirty days next preceding said election, and in the election district thirty days, that I am legally qualified to vote, that I have read (or have had read to me) the foregoing statements made in connection with my registration, and that they are true and correct. Any willful false statement made by me is perjury and punishable as such.

HIS OR HER MARK

SIGNATURE OF VOTER

SUBSCRIBED AND SWORN TO BEFORE ME THIS

DAY OF _____, 19____

SIGNATURE OF REGISTRAR OR PERSON AUTHORIZED TO ACT AS REGISTRAR

OCCUPATION | WARD | DIV. | PARTY AFFILIATION

77M SERIES ZOOM 7-69

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	CRIMINAL
v.	
MATTHEW J. CIANCIULLI, JR.	No. 79-165-1
JOSEPH R. RICCA	-2
ANTHONY FIORENTINO	-6

ORDER

AND NOW, TO WIT, this 23rd day of October, 1979, IT IS ORDERED that all defendants' motions for a new trial, judgment of acquittal and arrest of judgment are hereby *denied*. The Court's Opinion will follow in due course.

LOUIS C. BECHTLE, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2552 and 79-2553

UNITED STATES OF AMERICA,
Appellee,

v.

CIANCIULLI, MATTHEW J., JR.,
Appellant in No. 79-2552,
RICCA, JOSEPH R.,
Appellant in No. 79-2553.

Appeal From the United States District Court For the Eastern District of Pennsylvania D.C. Crim. Nos. 79-00165-01 and 79-00165-02

Argued June 12, 1980

Before HUNTER, WEIS and SLOVITER,
Circuit Judges

JUDGEMENT ORDER

After consideration of the contentions raised by appellants, to wit:

1) That the prosecutor's intentional and repeated references to the defendants' election not to testify in their own behalf constituted prejudicial error;

2) That the Government has failed to meet its burden to establish that a private communication with a juror that took place outside the courtroom was harmless to the appellants;

3) That the trial court committed prejudicial error in refusing to allow defendants to present expert testimony on what constitutes "residency";

4) That the trial court committed error in refusing to permit an exculpatory tape recording where the Government in its opening statement to the jury discussed it and the F.B.I. "wired" unindicted co-conspirator testified against the appellant Cianciulli;

It is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

James Hunter, III, *Circuit Judge*

Attest:

Thomas F. Quinn, *Clerk*

Dated: July 1, 1980

United States Court of Appeals
FOR THE THIRD CIRCUIT

Nos. 79-2552, 79-2553

UNITED STATES OF AMERICA,
Appellee,
CIANCULLI, MATTHEW J. JR.,
Appellant in No. 79-2552,
RICCA, JOSEPH R.,
Appellant in No. 79-2553.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEISS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

The petition for rehearing filed by

Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

James Hunter, III, *Judge*

Dated: July 29, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2552/79-2553

UNITED STATES OF AMERICA

vs.

MATTHEW J. CIANCULLI, JR.
and
JOSEPH R. RICCA,

Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 28, 1980.

Circuit Judge

Dated: August 13, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2552/79-2553

UNITED STATES OF AMERICA

vs.

MATTHEW J. CIANCULLI, JR.
and
JOSEPH R. RICCA,

Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 27, 1980.

Circuit Judge

Dated: August 26, 1980

A-92

Supreme Court of the United States

No. A-258

MATTHEW J. CIANCIULLI, JR.
and JOSEPH R. RICA,

Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 15, 1980.

/s/ William J. Brennan, Jr.

Associate Justice of the Supreme
Court of the United States

Dated this 22
day of September, 1980.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2552/3

UNITED STATES OF AMERICA

v.

CIANCIULLI, MATTHEW J., JR.,
Appellant in No. 79-2552
RICCA, JOSEPH R.,
Appellant in No. 79-2553

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until October 15, 1980.

Judge

Dated: September 23, 1980

Supreme Court, U. S.
FILED
DEC 9 1980
MICHAEL RODAK, JR., CLERK

No. 80-611

In the Supreme Court of the United States

OCTOBER TERM, 1980

MATTHEW CIANCIULLI, JR. AND JOSEPH R. RICCA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-611

MATTHEW CIANCIULLI, JR. AND JOSEPH R. RICCA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding expert testimony on a matter within the common knowledge of the jury.

2. Whether the district court erred in refusing to strike a juror who had been approached by a trial spectator, after a hearing determined that no prejudice resulted from the incident.

3. Whether the government improperly commented on petitioners' failure to testify.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A87–A88) is reported at 624 F.2d 1091 (table). The opinion of the district court (Pet. App. A1–A85) is reported at 482 F. Supp. 585.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1980. A petition for rehearing was denied on July 29, 1980 (Pet. App. A89). Mr. Justice Brennan extended the time for filing the petition for a writ of certiorari to October 15, 1980 (Pet. App. A92), and the petition was filed on that date. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners, Matthew Cianciulli and Joseph Ricca, were convicted of conspiracy to violate the rights and privileges of citizens in violation of 18 U.S.C. 241, conspiracy to provide false voter registration information in violation of 42 U.S.C. 1973(i)(c), and a number of counts of aiding and abetting the false registration of voters in violation of 42 U.S.C. 1973(i)(c).[1] Cianciulli was sentenced to three years' imprisonment, and Ricca was sentenced to imprisonment for one year and one day. The court of appeals affirmed by judgment order (Pet. App. A87–A88).

[1] Cianciulli was convicted on nine counts of aiding and abetting the false registration of voters; Ricca was convicted on three counts of aiding and abetting the false registration of voters in violation of 42 U.S.C. 1973 (i) (c). Cianciulli was acquitted on 13 voter registration and mail fraud counts; Ricca was acquitted on two voter registration counts (Pet. App. A4–A5 n.5).

Briefly, the evidence at trial established that petitioners conspired to encourage false voter registrations in Philadelphia, Pennsylvania, between March 1974 and September 1976. In the course of the conspiracy, 55 individuals registered to vote in the First Ward of Philadelphia, each giving as his residence one of nine addresses (see, *e.g.*, Pet. App. A23–A26 nn. 16–17, A29–A30 n.20, A32–A33 n.22, A64 n.34). One of the addresses was Cianciulli's official residence, which also housed a grocery store owned by him; another was owned by his mother. Ricca listed the grocery store address as his residence (Pet. App. A76–A77). Contrary to their representations, many of the registrants did not live at those addresses or anywhere within the district (see Pet. App. A25–A26 n.17). Petitioners also accompanied several registrants to the registration sites and coached them. Several voter registration forms mailed by alleged residents were, in fact, partially prepared by Cianciulli (Pet. App. A24–A25 n.16), who was at the time a Democratic committeeman in the First Ward, Thirteenth Division of Philadelphia; in 1976 Cianciulli was elected to the Pennsylvania Legislature (Pet. App. A3).

ARGUMENT

1. The government called Joseph Migatz, Administrator of the Voter Registration Division in the City of Philadelphia. In addition to explaining the ordinary procedure for voter registration in Philadelphia and identifying certain documentary evidence, Migatz testified generally, without objection, concerning the qualifications for voter registration. According to Migatz, to be eligible to register to vote a person must be a citizen of the United States, be 18 years of age, and live in the district at least 30 days before the election at his "address of residency" (1 Tr. 54). Registrants are required to provide this information demon-

strating their eligibility to register under oath (1 Tr. 61–62). On cross-examination, Migatz indicated that he understood the law to require that a registrant "actually live in a residence in order to vote from there" (1 Tr. 101; see *id.* at 103, 104). But Migatz agreed that there were exceptions to the general rule, as in the case of the provisions allowing for "absentee bailot[s]" (1 Tr. 102).[2] On redirect examination, Migatz testified that when he used the term "residency," he meant "where a person lives, where he physically lives" (1 Tr. 128). There was no objection from any of the defense counsel, but the court interrupted, stating:

> Residency has a plain meaning. It is not a technical meaning. It is a plain or common word that most lay persons know about and it's on the form and we'll have to measure a registrant's intent by the sum total of the form and what it says, and with all due respect to Mr. Migatz, his undisclosed belief of what [residency] means isn't relevant in this case.

1 Tr. 128. Even after this statement, none of the defense counsel moved to have Migatz's answer striken. Nor did any of the defense counsel seek any cautionary instruction to the jury.

During the defense case, Ricca called Michael McAllister, a practicing attorney since 1974 and a deputy assistant to one of the voting commissioners on the county board of election (7 Tr. 144).[3] Ricca hoped to establish through this witness that he had sufficient

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[2] Although it is not entirely clear, defense counsel's reference to "absentee ballots" was apparently intended to suggest that an individual could be legitimately registered in a district even though he was not physically present and therefore would have to vote by absentee ballot.

[3] Contrary to petitioners' assertion (Pet. 7), McAllister was not the "solicitor and Deputy Commissioner to the Philadelphia Voting Commission" (see 7 Tr. 144, 150).

connection with the address listed on his voter registration form to have it considered as his "residence" (7 Tr. 146–147). The court ruled that McAllister could not give a legal definition of "residency," render an expert opinion as to whether Ricca's contact with the address sufficiently established residency, or testify as to published definitions or decisions relating to dual residency, absent proof that they had been communicated to Ricca.[4] Petitioners contend (Pet. 6–9) that the trial court abused its discretion in restricting the defense's expert testimony.[5]

The admission of expert testimony is committed to the sound discretion of the district court, whose judgment will not be overturned absent a clear abuse of discretion. See, *e.g.*, *United States* v. *Watson*, 587

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[4] McAllister was permitted to testify, however, as to voter registration procedures. He also testified that Migatz's functions did not include residency determinations (7 Tr. 151–165).

[5] Petitioners also claim that the trial court abused its discretion in denying their request for an offer of proof prior to Migatz's testimony. Petitioners failed to raise this claim in the court of appeals, and therefore it should not be considered by this Court. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362–363 n.16 (1958). In any event, it is reasonably clear that petitioners suffered no prejudice as a result of the denial of their request. Beyond the bald assertion (Pet. 8–9) that the court's action somehow hampered their ability to cross-examine the witness, petitioners state nothing to indicate any prejudice to their rights. Migatz's testimony was primarily devoted to identifying and verifying records of his office (see 1 Tr. 56–58, 65–97). In addition, as noted above, Migatz testified generally as to the qualifications for registration (*id.* at 54; see *id.* at 56). Finally Migatz testified concerning the registration process (1 Tr. 61–63) and the procedure for challenging particular registrants (*id.* at 97–99). Given the nature of Migatz's testimony, it is apparent that any error in denying the requested "offer of proof" was harmless beyond a reasonable doubt. Petitioners listened to the testimony and were afforded adequate opportunity to cross-examine.

F.2d 365, 369 (7th Cir. 1978); *United States* v. *Brown*, 540 F.2d 1048 (10th Cir. 1976), cert. denied, 429 U.S. 1100 (1977). Where the subject of the proposed testimony relates to matters within "the field of common knowledge, experience and education of men," expert testimony is generally inadmissible. *United States* v. *Brown, supra*, 540 F.2d at 1054. The term "residence" has a plain everyday meaning with which jurors of common intelligence are as familiar as other citizens who are required to understand it for purposes of voter registration. McAllister's testimony concerning legal definitions of the term would thus have been inappropriate, since the subject is clearly within the common knowledge, experience, and education of the lay jurors.

The law of Pennsylvania defining the term residency is set out in some detail in the district court's opinion (Pet. App. A68–A70). The general rule is as follows:

> That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

Pet. App. A68. An individual's temporary absence from his home or his temporary presence in a place do not affect "residency" for purposes of voter registration (Pet. App. A68–A70). The district court "duly instructed the jury on the above-settled principles of Pennsylvania voter registration law concerning 'residence' " (Pet App. A70).[6] Petitioners do not complain that the court's jury instructions were erroneous or incomplete.[7] Thus, whatever Migatz's and McAllister's

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[6] Migatz's testimony concerning his understanding of the term "residency" is of course fully consistent with these principles.

[7] Indeed, when McAllister's testimony was offered, Cianciulli's counsel, as "representative counsel" (7 Tr. 143), stated that McAllister would "basically" agree that an individual must

opinions as to the meaning of the term "residency" may have been, the jury was properly instructed on the concept, and there was no reversible error.[8]

Finally, as the district court noted (1 Tr. 128), "expert" testimony concerning the legal definition of the term "residency" was irrelevant to any of the issues in this case. Petitioners were charged with and convicted of aiding and abetting the knowing or willful giving of false information for the purpose of establishing eligibility for voter registration, conspiracy to violate the civil rights of the qualified voters of the first ward of the 13th division of the City of Philadelphia, and conspiracy to encourage the false registration of voters. Absent any evidence that any of the improperly registered individuals, including Ricca, or any of the defendants knew of or relied on the opinions of McAllister or others that an individual may be qualified to register in a district even if he lives elsewhere, such testimony is irrelevant to the intent of either the defendants or the registrants.

Petitioners' reliance on *United States* v. *Garvin*, 565 F.2d 519 (8th Cir. 1977), is misplaced. In *Garvin*, a defendant charged with using the mails to defraud in-

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"live" in a particular district to register as a "resident" of that district (7 Tr. 146), but apparently would be asked to testify as to certain exceptions.

[8] Petitioners also complain (Pet. 7-8) that it was unfair to permit Migatz to state his opinion as to the meaning of the term while prohibiting McAllister from similarly stating his opinion. Petitioners never objected to Migatz's general statements as to his understanding of the term residency. Indeed, the point was emphasized during cross-examination. When the government sought to elicit further testimony concerning Migatz's understanding of the term on redirect examination, the court unequivocally stated that such testimony was irrelevant to the issues in this case (see page 3, *supra*). In these circumstances, it is plain that defendants suffered no prejudice and that there was no unfairness in excluding McAllister's testimony.

surance companies by submitting false applications testified that he had accurately answered the pertinent questions as he understood them. The court of appeals held that the trial court had erroneously excluded expert testimony that was intended to show that the defendant's interpretation of the contract was correct, and which was relevant to other issues in the case as well. The court of appeals emphasized the "technical" nature of the language of the insurance contract.

Unlike the defendant in *Garvin*, petitioners did not testify that they thought it proper to encourage or assist individuals to register to vote in a district in which they had never lived. Whether Ricca was validly registered is largely immaterial in this case since he was not charged with false registration, although he is listed as one of 43 individuals who were improperly registered pursuant to the conspiracies charged in Counts 1 and 49 (Pet. App. A14 n.9). Nor is there any evidence to show that the individuals alleged to have been falsely registered believed that any of the "temporary absence" exceptions were applicable to them, although some testified that they did not know that their actions were illegal (Pet. App. A11–A12 n.6). Thus, unlike *Garvin*, the expert testimony offered in this case was irrelevant to any issues in the case. Finally, petitioners apparently concede that the court's instructions on the meaning of the term "residence" were accurate and complete. Petitioners therefore could have suffered no prejudice as a result of either the admission of Migatz's testimony or the exclusion of McAllister's testimony.[9]

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[9] Petitioners' reliance on *United States* v. *Dellinger*, 472 F.2d 340, 382–385 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), is also misplaced. In *Dellinger*, the defendants were charged with inciting a riot. The defense theory was that the riot was caused by the improper crowd control procedures used by the police rather than by the speeches of the defendants. The court

2. Petitioners contend (Pet. 9–10) that the district court's resolution of the issues raised by an improper communication to one of the alternate jurors by a relative of one of their co-defendants violated their rights to due process.

As described in the district court opinion (Pet. App A77–A84), the facts of this case provide no basis for this contention. On Friday, September 14, 1979, the second full day of trial, a man approached one of the alternate jurors, asked her name and where she lived, and then offered to drive her home. She declined the offer. On the following Monday, the juror told her fellow jurors about the incident and, on their advice, informed the court. The next day, the juror identified the man who had approached her to the court deputy clerk. Agents of the Federal Bureau of Investigation questioned the man and learned that he was the brother of one of petitioners' co-defendants.

When the trial judge learned the identity of the man, he informed petitioners and their counsel. Then, in the presence of counsel, the court examined the juror who had been approached as well as the other jurors in an effort to determine whether the incident would affect the jury's deliberations in any way. None of the jurors knew the man's name or whether he was associated with the government or the defense. All of the jurors testified, under oath, that they had not been prejudiced against any of the parties by the incident and that they would decide the case impartially and solely on the evidence presented (5 Tr. 86–133; 6 Tr. 3–9). On the basis of its examination, the court concluded (Pet App. A81) "that there was no prejudice to

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of appeals held that the trial judge had erred in excluding expert testimony concerning proper crowd control technique and the likely reaction of a crowd to improper technique, both matters beyond the ordinary experience of the average juror and relevant to the issues in the case.

any defendant because of the juror's contact." Thus, petitioners' reliance on *Remmer* v. *United States*, 347 U.S. 227 (1954), is wholly misplaced.[10]

Equally insubstantial is petitioners' suggestion (Pet. 9) that the trial judge's failure to inform them of the incident until after he learned the identity of the man who had approached the alternate juror and the alternate had been seated as a member of the panel was prejudicial. As the district court observed (Pet. App. A80), "[t]he defendants were informed of the incident as soon as the outsider was identified so that a meaningful inquiry could be initiated." When the judge first learned of the incident, the other jurors already knew. Thus, there was no immediate need to inform defense counsel to prevent the alternate from telling the other jurors. There was nothing to be done until the man could be identified and a "meaningful inquiry" conducted. Even if it would have been better practice to have informed counsel of the incident before the alternate was seated as a regular juror, the trial court's delay in this case was harmless. Cf. *United States* v. *Mitchell*, 590 F.2d 816, 817 (6th Cir. 1979); *United States* v. *Doe*, 513 F.2d 709 (1st Cir. 1975).

3. Finally, petitioners contend (Pet. 10–11) that the government improperly commented on their failure to testify. The district court rejected this claim in a thor-

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[10] In *Remmer* this Court held that a district court could not determine *ex parte* whether improper communications with a juror were prejudicial. 347 U.S. at 229–230. This Court's subsequent decision in *Remmer* v. *United States*, 350 U.S. 377 (1956), also does not suggest that the district court's resolution of the issues in this case was an abuse of discretion. Unlike the facts in *Remmer*, here the jurors did not know whether the man was associated with any of the defendants or the government. Nor did the alternate juror have any reason to think that she was under investigation by the FBI or that the outcome of the case could lead to such an investigation.

ough and well-reasoned opinion upon which we rely (Pet. App. A7–A54). The prosecutor's statement in rebuttal summation that certain evidence was "uncontradicted" was, as the court found, neither directed at nor understood to relate to petitioners' failure to testify. Rather, it was addressed to their failure to present other potential witnesses and was a fair response to defense counsel's challenges in their closing arguments. In the second allegedly impermissible statement, also made in closing argument on rebuttal, the government responded to arguments that certain immunized witnesses had received favorable treatment by suggesting that those individuals received benefits because they cooperated, in contrast to the defendants' persistent "stonewalling" (8 Tr. 14). The district court found that this argument was intended to respond to defense suggestions of prosecutorial unfairness, and that in context it could not have been interpreted as a comment on petitioners' failure to testify.[11] Finally, in light of the court's careful jury instructions on a defendant's right not to testify and the burden of proof, as well as the jury acquittal of one non-testifying defendant on all charges and the acquittal of petitioners on several counts, it is clear that no prejudice resulted from the two brief and unemphasized remarks.

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[11] Even if it was understood as a comment on certain defendants' failure to testify, in context it could only have related to the four co-defendants who were specifically mentioned immediately thereafter, and not to petitioners (8 Tr. 14–15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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